(1)

Supreme Court, U.S.
FILED

081361 MAY 1 - 2009

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

SWISHER INTERNATIONAL, INC.,

Petitioner,

v.

TOM VILSACK,
Secretary of Agriculture,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

ANDREW G. CELLI, JR.*
ERIC HECKER
Emery Celli Brinckerhoff & Abady LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
(212) 763-5000

**Counsel of Record*

QUESTIONS PRESENTED

The Fair and Equitable Tobacco Reform Act, Pub. L. No. 108-357, 118 Stat. 1524 (codified at 7 U.S.C. § 518 *et seq.* (2004)) ("FETRA") requires one class of private parties (cigar manufacturers) to make hundreds of millions of dollars in payments for the benefit of another class of private parties (former beneficiaries of the recently discontinued federal tobacco price support program), despite the absence of any meaningful connection between the parties Congress sought to assist and those Congress singled out to be burdened.

The court of appeals, relying heavily on this Court's splintered decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), held that monetary assessment schemes are not cognizable under the Takings Clause at all, and that, unlike the statute struck down in *Apfel*, FETRA comports with Due Process because it is not "retroactive."

The questions presented are:

1. Whether monetary assessment schemes are *per se* immune from Takings Clause scrutiny on the ground that money is not "property" within the meaning of the Fifth Amendment?

2. Whether the highly deferential standard that governs Due Process challenges to ordinary regulatory or taxing legislation is appropriate where the law at issue effects a direct wealth transfer from one class of private parties to another?

CORPORATE DISCLOSURE STATEMENT

Petitioner Swisher International, Inc. states that it is a wholly owned subsidiary of Swisher International Group Inc. No publicly held corporation owns ten percent or more of the stock in either Swisher International, Inc. or Swisher International Group Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES ..... vi-ix

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 2

A. Statutory Framework 2

B. Proceedings Below 6

REASONS FOR GRANTING THE PETITION 10

I. THIS COURT SHOULD CLARIFY THAT NEITHER *APFEL* NOR ANY OTHER PRECEDENT PERMITS THE RESTRICTIVE VIEW OF THE TAKINGS CLAUSE ESPOUSED BY THE COURT BELOW 11

A. The Lower Courts Are Deeply Divided Regarding How to Read *Apfel* and Regarding Whether Monetary Assessment Schemes Implicate the Takings Clause 11

B. The Eleventh Circuit's Holding that Monetary Assessments Are Not Subject To Takings Clause Scrutiny Is Incorrect and Conflicts With Decisions of This Court, Both Recent and Venerable.....14

II. THE ELEVENTH CIRCUIT'S MISUNDERSTANDING OF APPLICABLE DUE PROCESS PRINCIPLES HEIGTHTENS THE SIGNIFICANCE OF ITS UNDULY NARROW READING OF THE TAKINGS CLAUSE.....18

A. "Retroactivity" Is Not a Required Element of a Due Process Clause Challenge to a Monetary Assessment Scheme.....19

B. The Lower Court's Focus on "Retroactivity," Coupled With Its Restrictive View of the Takings Clause, Leaves a Wide and Dangerous Gap In the Fifth Amendment's Protection Against Abuses of Power.....24

CONCLUSION.....25

APPENDIX

Appendix A: Eleventh Circuit Opinion 1a

Appendix B: District Court Opinion 33a

Appendix C: FETRA 71a

Appendix D: Stipulations of Fact 95a

TABLE OF AUTHORITIES

FEDERAL CASES: **PAGE NO(s):**

A.T. Massey Coal Co. v. Massanari,
305 F.3d 226 (4th Cir. 2002).....11

Albright v. Oliver,
510 U.S. 266 (1994) 17

Armstrong v. United States,
364 U.S. 40 (1960) 17, 22

Ass'n of Bituminous Contractors, Inc. v. Apfel,
156 F.3d 1246 (D.C. Cir. 1998) 11

BMW of North America, Inc. v. Gore,
517 U.S. 559 (1996) 19

Bowen v. Gilliard,
483 U.S. 587 (1987) 14

Calder v. Bull,
3 U.S (3 Dall.) 386 (1798) 24

Chevron USA, Inc. v. Bronster,
363 F.3d 846 (9th Cir. 2004) 11

Collins v. City of Harker Heights,
503 U.S. 115 (1992) 16

Commonwealth Edison Co. v. United States,
271 F.3d 1327 (Fed. Cir. 2001) 11

Connolly v. Pension Benefit Guaranty Corp.,
475 U.S. 211 (1986) 14

Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2003) 19

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) .....*passim*

Franklin County Convention Facilities Auth.
v. Am. Premier Underwriters, Inc.,
240 F.3d 534 (6th Cir. 2001) 11

Kelo v. City of New London,
545 U.S. 469 (2005) 16

Lingle v. Chevron USA, Inc.,
544 U.S. 528 (2005) 11, 16

Marks v. United States,
430 U.S. 188 (1977) 8

Mobile Oil Corp. v. Commissioner of Taxes of Vermont,
445 U.S. 425 (1980) 20

Ott v. Mississippi Val. Barge Line Co.,
336 U.S. 169 (1949) 20

Parella v. Ret. Bd. of the R.I. Employees' Retirement Sys.,
173 F.3d 46 (1st Cir. 1999) 16

Penn Central Transportation Co. v. New York City,
438 U.S. 104 (1978) 6

Pennell v. City of San Jose,
485 U.S. 1 (1988) 18

Philip Morris USA v. Williams,
549 U.S. 346 (2007) 16

Phillips v. Washington Legal Foundation,
524 U.S. 156 (1998) 14

Plaut v. Spendthrift Farms, Inc.,
514 U.S. 211 (1995) 18

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) 19

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 23

United States Fidelity & Guaranty Co. v. McKeithen,
226 F.3d 412 (5th Cir. 2000) 12

United States v. Alcan Aluminum Corp.,
315 F.3d 179 (2d Cir. 2003) 11

United States v. Dico, Inc.,
266 F.3d 864 (8th Cir. 2001) 11

United States v. Sperry Corp.,
493 U.S. 52 (1989) 15

Unity Real Estate Co. v. Hudson,
178 F.3d 649 (3d Cir. 1999) 11

Usery v. Turner-Elkhorn Mining Co.,
428 U.S. 1 (1976) 8

Village of Norwood v. Baker,
172 U.S. 269 (1898) 13

Webb's Fabulous Pharmacies v. Beckwith,
449 U.S. 155 (1980) 14

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 23

Wickard v. Filburn,
317 U.S. 111 (1942) 3

STATE CASES:

Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek,
729 N.E.2d 349 (Ohio 2000) 13

North Carolina v. Philip Morris USA Inc.,
618 S.E.2d 219 (N.C. 2005) 4, 6

Northern Illinois Home Builders Ass'n v. County of Du Page,
649 N.E.2d 384 (Ill. 1995) 13

Town of Flower Mound v. Stafford Estates Ltd.,
135 S.W.3d 620 (Tex. 2004) 13

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Eleventh Circuit (App., *infra*, 1a-23a) is reported at 550 F.3d 1046. The opinion of the District Court (App., *infra*, 24a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2008. Justice Thomas extended the time for filing this petition to and including May 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The various provisions of FETRA are set forth in the Appendix at 71a-94a.

STATEMENT

This case raises important questions about the nature and degree of the protections afforded by the Takings Clause and the Due Process Clause that were addressed, but not settled, by this Court in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

As the decisions below recognized, FETRA is a highly unusual – indeed, unique – statute. It provides for cash compensation to one group of private parties (those who benefited from the federal government's tobacco price support program) that is funded by massive assessments imposed on other private parties (cigar companies) that have no real connection to, let alone responsibility for, the problem Congress sought to address. The district court did not hesitate to pronounce this regime "incongruous," "unpalatable," "onerous," and "unjust." App., *infra*, 49a, 70a.

That court and the court of appeals nonetheless sustained FETRA, ruling that neither the Takings Clause nor the Due Process Clause provides a basis for invalidating – or even meaningfully examining – the scheme. As the Eleventh Circuit emphasized, its effort (and those of other courts throughout the country) to analyze these important constitutional questions was complicated by this Court's enigmatic decision in *Apfel*, in which similar, unorthodox federal legislation was held invalid, but in which no ground for the Court's judgment garnered majority support.

Review by this Court is warranted in order to dispel that widely recognized confusion, and to clarify that the highly restrictive view of the Takings and Due Process Clauses espoused by the courts below is untenable.

A. Statutory Framework

In 1938, Congress enacted the Agricultural Adjustment Act to address concerns about price and supply

fluctuations in commodities markets and their effects on farm incomes. Pub. L. No. 75-430, 52 Stat. 31 (codified as amended in scattered sections of 7 U.S.C.). The Act replaced free markets for various commodities, including tobacco, with a complex system of supply controls and price supports to be administered by the Department of Agriculture. *See generally Wickard v. Filburn*, 317 U.S. 111, 115 (1942).

During the ensuing decades, these quota and price support programs were the subject of repeated reform and repeal efforts. Congress grew concerned, among other things, that benefits were being distributed to large businesses, and that artificially inflated prices were burdening consumers and placing American producers at a competitive disadvantage in increasingly global markets. With respect to domestically grown tobacco, the erosion of demand attributable to foreign competition was aggravated by an abrupt drop in demand from cigarette manufacturers, long the dominant purchasers of domestic tobacco, as a result of obligations imposed under their landmark 1998 settlement agreement with 47 States. *See generally North Carolina v. Philip Morris USA Inc.*, 618 S.E.2d 219 (N.C. 2005). By 2004, Congress had determined to discontinue the tobacco price support program.

Congress recognized that the sudden discontinuation of the tobacco price support program after so many decades could have severe consequences for those who had come to rely on it, many of whom were elderly. *Tobacco Quota Buyout: Hearing Before the House Committee on Agriculture*, 108th Cong. 4 (2003), at 18. As it had with other commodities, Congress decided to ease these hardships with a "buyout." Congress therefore enacted FETRA, which entitles former program participants to receive payments of $9.6 billion over ten years (2005 through 2014).[1]

---

[1] The statute provides for $10.14 billion in funding. 7 U.S.C. § 518f. Of this amount, $9.6 billion will be paid to price support program participants, and the remainder will reimburse the

Eligibility for these payments is not limited to those who actually were growing tobacco at the time of the statute's enactment. To the contrary, Congress provided that payments will be made not only to tobacco "producers," but also to "quota holders" – those persons who were allocated the right to grow a given amount of tobacco under the former system, most of whom exercised their prerogative to transfer that right to others. 7 U.S.C. §§ 518a, 518b.

Indeed, Congress expressly provided that seventy percent of FETRA's buyout funds (approximately $6.7 billion) will be paid to the approximately 415,000 tobacco quota holders, with thirty percent ($2.9 billion) allocated to the approximately 57,000 tobacco producers. Taking into account that some quota holders are also producers, the large majority of the funds will be paid to an estimated 358,000 non-operator landlords who were not producing tobacco when FETRA was enacted, many of whom had not done so in years if not decades. Jasper Womach, *Tobacco Quota Buyout*, Congressional Research Service, Library of Conference, Report to Congress No. RS22046, at 2 (Dec. 31, 2005).[2]

Although FETRA payments are nominally made pursuant to "contracts" between the federal government and the recipients, 7 U.S.C. §§ 518a(a), 518b(a), these agreements do not impose any future obligations on the recipients. To the contrary, FETRA provides for and allocates payments to

---

Commodity Credit Corporation for losses it sustained selling leftover tobacco pool stocks it had purchased at inflated prices.

[2] FETRA entitles quota holders to collect a total of $7.00 per pound ($.70 per year for 10 years) for their 2002 quotas. 7. U.S.C. § 518a(e). Producers are entitled to collect a total of $3.00 per pound ($.30 per year for 10 years) for their 2002 productions. *Id.* § 518b(d). The total national quota was approximately 960 million pounds in 2002, yielding a total of $9.6 billion in FETRA payments.

former program participants based exclusively on their past quota/production levels – specifically, those in 2002. *Id.* §§ 518a(c), 518b(c).

Unlike comparable "buyout" and other social welfare programs, however, FETRA's payments to former price support program beneficiaries do not come from the general treasury. FETRA is funded entirely through assessments on private parties: manufacturers and importers of various types of tobacco products. *Compare, e.g.*, Pub. L. No. 107-171, 116 Stat. 179 (codified at 7 U.S.C. § 7959 (2002)) (providing for buyout of peanut quota holders to be funded by the general treasury).

Although the tobacco price support program focused principally on the two types of tobacco used in cigarettes (flue-cured and burley), Congress decided that the payments to past program beneficiaries will be funded through monetary assessments imposed on manufacturers of *all* types of tobacco products, including cigars, which are made primarily with a type of tobacco (air-cured) that was not part of the price support program. Each year, the Secretary of Agriculture allocates liability among the manufacturers of the six types of tobacco products – cigarettes, cigars, snuff, chew, roll-your-own, and pipe tobacco – based on the current aggregate domestic sales of each type. 7 U.S.C. §§ 518d(b)(3), d(c), d(e).

The face of the statute suggests that these newly-imposed obligations will be borne overwhelmingly by cigarette manufacturers, which collectively account for over 96% of overall domestic sales of tobacco products. *Id.* § 518d(c)(1)(A). However, those companies were, as Congress was keenly aware when it enacted the statute, *already* legally obligated to pay more than $5 billion to tobacco growing interests pursuant to their global settlement agreement with the States. *North Carolina v. Philip Morris USA Inc.*, 618 S.E.2d 219, 221-24 (N.C. 2005). That settlement agreement expressly provided that the cigarette manufacturers' liability

to the growers would be reduced, dollar for dollar, if an assessment scheme such as FETRA were ever enacted. *Id.* Had Congress raised excise taxes rather than enacting an assessment scheme, this offset would not have been triggered. This undoubtedly accounts in large part for the fact that, very much unlike other tobacco-related legislation, FETRA did not encounter significant political opposition from cigarette manufacturers, and that Philip Morris actively supported it.

B. Proceedings Below

Petitioner Swisher International, Inc. ("Swisher") is one of the country's leading cigar manufacturers. After it made its first FETRA payments and exhausted its administrative remedies, Swisher commenced this action against the Secretary of Agriculture, maintaining, *inter alia*, that FETRA violates the Takings and Due Process Clauses of the Fifth Amendment.[3]

Rather than engaging in discovery, the parties agreed to stipulate to the relevant facts and to litigate the constitutionality of FETRA's application to Swisher on cross-motions for summary judgment. App., *infra*, 95a-99a.

In opposing the government's motion, Swisher maintained that FETRA's unorthodox character and the severe and unjustifiable special burdens it imposes render it an unconstitutional taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *see id.* at 123-28 (requiring courts to consider the economic impact of the regulation; the owner's reasonable investment-backed expectations; and the character of the regulatory action).

---

[3] Swisher also raised an Equal Protection challenge to the manner in which FETRA allocates assessment liability among the six types of tobacco products.

Swisher demonstrated that it has been severely impacted by FETRA. During the first calendar year after FETRA was enacted, Swisher was assessed and paid over $11 million to fund the government's buyout payments to quota holders and producers. By 2014, Swisher likely will have been compelled to pay in excess of $100 million.

Swisher further highlighted a number of unusual and constitutionally troubling attributes of the FETRA regime, including (i) that the assessments, which are paid to past beneficiaries of government support without imposing any present or future obligations, cannot be described as "regulating" the tobacco market; (ii) that the assessments have no nexus to any past harm Swisher caused quota holders or producers or any benefit Swisher derived from the price support program; and (iii) that the assessments are, by design, grossly disproportionate to Swisher's *de minimis* connection to the price support program.

Indeed, although Swisher purchased scarcely one-thirtieth of one percent (0.0305%) of the tobacco subject to the program during the six years leading up to the enactment of FETRA, its share of the total FETRA funding obligation for 2005 was nearly 30 times as large. App., *infra*, 96a-97a (Stipulation ¶¶ 13-18).

Swisher argued that these features are strikingly similar to – but even worse than – those that led this Court to strike down the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act") in *Apfel*. Relying on the four-Justice plurality opinion concluding that the Coal Act violated the Takings Clause, Swisher demonstrated that FETRA similarly imposes severe liability "on a limited class of parties that could not have anticipated the liability," and that its liability is "substantially disproportionate to" any connection to the beneficiaries that could support requiring Swisher to underwrite their buyout. *Id.* at 528-29. Recognizing that the lead opinion in *Apfel* is not itself controlling, Swisher maintained that the aspects of FETRA that rendered it

unconstitutional under the *Apfel* plurality's Takings Clause analysis likewise condemn the statute under the alternative Due Process Clause analysis advocated in Justice Kennedy's concurring opinion.

Rather than addressing the statute's design and operation, the government's submissions consisted almost entirely of doctrinal arguments aimed at insulating FETRA from meaningful scrutiny. The government first contended that, although FETRA's payments are neither paid into nor from the general treasury, FETRA should be treated as a "tax," rather than an assessment scheme, such that the Takings Clause is inapplicable. The government then argued that the Takings Clause is *per se* inapplicable to statutes requiring the payment of money (as opposed to other forms of private property), and that *Apfel* is distinguishable because FETRA is not "retroactive" in the sense that the Coal Act was.[4]

The district court bluntly acknowledged the manifest unfairness of FETRA's assessment scheme, particularly as applied to cigar manufacturers like Swisher. It rejected the government's argument that FETRA should be considered a tax, but nonetheless granted the government summary judgment. The court disposed of Swisher's Takings claim in a single sentence, holding that the Clause is not implicated when one person is required "to use his or her assets for the benefit of another." App., *infra*, 56a. The court then accepted the government's argument that Swisher's Due Process claim should be reviewed (and rejected) under the highly deferential standard applicable to ordinary regulatory measures. *Id.* (citing *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976)).

---

[4] The government conceded that jurisdiction was proper before the district court, and that the Tucker Act did not require Swisher to bring its claims in the Court of Claims. FETRA expressly so provides. 7 U.S.C. § 518d(j).

The Eleventh Circuit affirmed. Acknowledging the importance of *Apfel* to the disposition of this case, the panel majority attempted to identify a controlling opinion in *Apfel* by applying the "narrowest ground" test articulated in *Marks v. United States*, 430 U.S. 188 (1977). Recognizing that other courts of appeals had divided over which (if any) of the *Apfel* opinions should govern, the court concluded that neither the plurality nor the concurring opinion was binding. Engaging in its own constitutional analysis, the court held that the Takings Clause is "not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation." App., *infra*, 14a. The court reasoned that the Takings Clause does not apply to monetary deprivations because it "operates only as a conditional limitation, permitting the taking so long as the government pays just compensation," and not "a substantive or absolute limit on the government's power to act." *Id.* Acknowledging that this Court has, in a number of cases, applied the Takings Clause to laws requiring the payment of money, the court distinguished those decisions on the ground that they involved "separately identifiable fund[s] of money," *id.* at 16a, and "some semblance" of a property interest, *id.* n.9.[5]

With respect to Due Process, the court held that the careful scrutiny to which Justice Kennedy's concurrence subjected the Coal Act in *Apfel* is inappropriate in this case because "the obligation upon Swisher * * * is not retroactive." App., *infra*, 17a. Applying "deferential" review, the court accepted Congress's judgment that "tobacco farmers and quota holders should be provided some cushion" from the abrupt termination of the price support regime, and that it was appropriate to single out cigar companies like Swisher to fund it. *Id.* at 19a.

---

[5] Judge Cox did not join his colleagues' Takings Clause analysis. Rather, he specially concurred in the judgment. App., *infra*, 23a.

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted in order to dispel widespread confusion and disagreement among the lower courts about the significance of this Court's decision in *Apfel* – confusion about the procedural question whether *Apfel* is binding precedent for any constitutional rule, and confusion about the substantive question whether monetary assessments implicate "property" interests that are protected by the Takings Clause.

Review is also needed in order to correct a serious and increasingly prevalent misunderstanding, typified by the decision below, regarding the manner in which narrowly targeted monetary assessment schemes implicate Due Process Clause concerns. Like most courts, the Eleventh Circuit read *Apfel* to stand for the proposition that monetary assessment schemes that are not "retroactive" will be upheld unless they are wholly irrational. Such talismanic focus on "retroactivity" tears the Due Process inquiry from its moorings: whether there is a constitutionally sufficient *nexus* between the private parties that are benefited and those that are burdened, and whether there is sufficient *proportionality* between the burden imposed and the burdened party's responsibility for the problem. "Retroactivity" is one way to demonstrate the absence of such a nexus and proportionality, but there surely are others.

This case presents a stark example of the danger of applying garden-variety rational basis review to an assessment scheme that, while not "retroactive" in the precise sense that the Coal Act was, is devoid of any meaningful nexus between the transferors and the transferees; that imposes highly disproportionate burdens; and that evaded the political process that ordinarily constrains broadly applicable taxing and regulatory measures.

This case is an especially appropriate vehicle for addressing these issues because the Eleventh Circuit was presented with and rejected claims that FETRA violated both the Takings and the Due Process Clauses, and because this appeal arises from a very simple and truly undisputed factual record consisting of a narrow set of facts to which the parties have stipulated. App., *infra*, 95a-99a.

I. THIS COURT SHOULD CLARIFY THAT NEITHER *APFEL* NOR ANY OTHER PRECEDENT PERMITS THE RESTRICTIVE VIEW OF THE TAKINGS CLAUSE ESPOUSED BY THE COURT BELOW

A. The Lower Courts Are Deeply Divided Regarding How to Read *Apfel* and Regarding Whether Monetary Assessment Schemes Implicate the Takings Clause

As the Eleventh Circuit expressly recognized, this Court's Takings Clause jurisprudence has engendered widespread disagreement and confusion among the courts of appeals in two fundamental respects.

First, the courts of appeals are split regarding whether there is a controlling opinion in *Apfel*.

At least four federal Circuits (the First, Third, Fourth, and Federal Circuits) have held that Justice Kennedy's concurrence, coupled with the views expressed in the

dissenting opinion in *Apfel*, constitute five votes – and hence binding authority – for the proposition that monetary assessment schemes do not implicate the Takings Clause. *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 237 & n.7 (4th Cir. 2002); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338-39 (Fed. Cir. 2001); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999); *Parella v. Ret. Bd. of the R.I. Employees' Retirement Sys.*, 173 F.3d 46, 58 (1st Cir. 1999). These courts held that they were "bound to follow the five-four vote against the takings claim in [*Apfel*]." *Unity Real Estate*, 178 F.3d at 659.

Six other Circuits (the Second, Sixth, Eighth, Ninth, and D.C. Circuits, and now the Eleventh Circuit) have held that *Apfel* did *not* settle whether monetary assessment schemes implicate the Takings Clause. *Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 852 (9th Cir. 2004), *rev'd on other grounds sub nom., Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *United States v. Dico, Inc.*, 266 F.3d 864, 880 (8th Cir. 2001); *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 (D.C. Cir. 1998). These courts have held that "the inability of a majority of the Court to agree on a single rationale for the result renders [*Apfel*] of no precedential value outside of the specific facts of the case." *Chevron*, 363 F.3d at 852.

Under any circumstances, such marked confusion regarding the holding in *Apfel* would warrant this Court's review. At a minimum, lower courts should not be compelled to devote so much time and effort attempting to divine whether there is even a binding holding in *Apfel*.

Moreover, among those courts that, like the Eleventh Circuit, have concluded that *Apfel* is not binding authority with respect to the Takings Clause, there is significant division as to the underlying substantive question: whether

monetary assessments are subject to challenge under the Takings Clause.

The Eleventh Circuit held below, for example, that the Takings Clause is "not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation." App., *infra*, 14a. That holding conflicts with the Fifth Circuit's decision in *United States Fidelity & Guaranty Co. v. McKeithen*, 226 F.3d 412 (5th Cir. 2000). *McKeithen* struck down as an unconstitutional taking Louisiana's Workers' Compensation Second Injury Fund, which required insurers to contribute money to a common fund earmarked for compensating previously disabled workers who were injured for a second time. In doing so, the Fifth Circuit considered and rejected the notion that the Takings Clause imposes no limit on the government's power to take money through an assessment scheme. *Id.* at 420.[6]

The Eleventh Circuit's holding also cannot be reconciled with decisions of several state courts of last resort holding that monetary obligations imposed to "offset" the impact of development are subject to Takings Clause scrutiny. *See., e.g. Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *Northern Illinois Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *see also Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620 (Tex. 2004) (applying Takings Clause to condition that developer must

---

[6] Attempting to harmonize these divergent holdings, the Eleventh Circuit suggested that *McKeithen* "did involve an identifiable property interest" – presumably the specific sums of money that were assessed pursuant to the Louisiana scheme. App., *infra*, 16a n.7. The Eleventh Circuit made no attempt, however, to explain how the "identifiable property interest" at issue in *McKeithen* is in any way different from the specific and identifiable property interest in this case: the $11,069,140.61 that Swisher was assessed pursuant to FETRA in 2005, coupled with the equally specific assessments it has been forced to pay in years since.

pay for adjacent road upgrades); *but see McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008).

B. The Eleventh Circuit's Holding that Monetary Assessments Are Not Subject To Takings Clause Scrutiny Is Incorrect and Conflicts With Decisions of This Court, Both Recent and Venerable

More than a century ago, this Court held in *Village of Norwood v. Baker*, 172 U.S. 269 (1898), that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking * * * of private property for public use without compensation." *Id.* at 279 (striking down scheme imposing monetary assessments on adjacent landowners to fund the cost of building a new street).

This Court has on numerous subsequent occasions applied the Takings Clause to government actions that entail the appropriation of money (rather than real or other forms of personal property) from private parties.

For example, *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), involved a requirement that lawyers contribute the interest on their attorney escrow accounts to a common fund. Far from rejecting the plaintiffs' Takings Clause claim on the ground that an obligation to pay money is never a taking, this Court expressly held that the confiscated interest income *was* "private property" and subjected the scheme to Takings Clause review. *Id.* at 172.

Similarly, *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155 (1980), held that a statute collecting the interest on court interpleader accounts amounted to an unconstitutional taking. In doing so, this Court stressed that the government "by ipse dixit, may not transform private property" – *i.e.*, money – "into public property." *Id.* at 164; *see also Bowen v. Gilliard*, 483 U.S. 587 (1987) (applying

Takings Clause analysis to Aid to Families with Dependent Children eligibility requirement that included all family members' incomes); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) (applying Takings Clause analysis to requirement of Multiemployer Pension Plan Amendments Act of 1980 that employer withdrawing from multiemployer pension plan must pay its proportionate share of the plan's unfunded vested benefits).

These precedents stand for the proposition that the mere fact that the government has taken money (as opposed to some other form of property) does not insulate a statute from the reach of the Takings Clause.[7]

The efforts of the Eleventh Circuit to anchor its categorical restriction in the language of the Constitution do not fare well. The court held that the Takings Clause cannot apply to monetary deprivations because it "operates only as a conditional limitation, permitting the taking so long as the government pays just compensation," and not "a substantive or absolute limit on the government's power to act." App.,

---

[7] With all respect, the Eleventh Circuit's effort to harmonize its rule with *Phillips* and *Beckwith* on the ground that the regimes at issue in both of those cases involved "specific, identifiable, property interests" – namely, the interest in specific interest-bearing bank accounts – makes no sense. App., *infra*, 13a n.6. Money, after all, is *fungible*. There simply is no difference between a "specific fund of money" and plain old "money" – and certainly no difference that could rise to the level of constitutional magnitude. *See United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (subjecting claims tribunal fee scheme to Takings Clause scrutiny, but refusing to treat the fee scheme as a "permanent physical occupation" of property constituting a per se taking, because "money is fungible"). It cannot be that the government is forbidden from confiscating a "specific" twenty dollar bill from a citizen, but that the Takings Clause is not implicated where the government orders a citizen to pay over *any* of her twenty dollar bills.

infra, 14a. Post-*Apfel* decisions of this Court conclusively rebut this view. For example, although this Court divided sharply as to the outcome of the constitutional question in *Kelo v. City of New London*, 545 U.S. 469 (2005), opinions signed by all nine Justices recognized that the Takings Clause *can* provide a substantive basis for invalidating governmental action, even though it often is merely a vehicle for demanding compensation.

Moreover, the proposition that money is not "property" within the meaning of the Takings Clause is belied by the fact that *both* the Due Process Clause *and* the Takings Clause are triggered by an assertion of a "property" interest. The Eleventh Circuit's view simply cannot be squared with decisions by this Court such as *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), holding that subjecting civil litigants to excessive punitive damages awards – which impose obligations to pay precise sums of money, but which do not specify the particular funds that must be turned over – are subject to review and invalidation under the Fifth Amendment.

The Eleventh Circuit's assumption that the Due Process Clause (rather than the Takings Clause) is the more appropriate basis for analyzing FETRA's constitutionality also is in tension with this Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). In rejecting the claim that a particular line of Takings Clause authority supported heightened scrutiny of a commercial rent cap, *Lingle* explained that the Takings Clause is fundamentally concerned with "the *magnitude or character of the burden*" and how the burden is "*distributed* among property owners." *Id.* at 542 (emphases in original). In this case, Swisher's objection is not that it was impermissible or unwise for Congress to provide assistance to tobacco farmers, but rather that it was improper for Congress to fund the buyout by imposing hundreds of millions of dollars in assessments on parties like Swisher that had only a glancing connection to the

government program and no basis to anticipate the imposition of such staggering liability. The lesson of *Lingle* is that such a claim lies primarily (though not necessarily exclusively) under the Takings Clause. *See also Armstrong v. United States*, 364 U.S. 40, 49 (1960) (reaffirming that the core concern of the Takings Clause is that the government should not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

The assumption that principles of judicial restraint support analyzing claims under the Due Process Clause, rather than the Takings Clause, is also flawed. This Court has repeatedly admonished that courts should not reach Due Process Clause issues when a more narrow provision of the Constitution is implicated, and that courts should not address open-ended Due Process issues except when necessary. *Albright v. Oliver*, 510 U.S. 266, 271-74 (1994) (plurality opinion); *id.* at 267 (Scalia, J., concurring); *id.* (Ginsburg, J., concurring); *id.* at 281 (Kennedy, J., concurring); *Collins v. City of Harker Heights*, 503 U.S. 115, 125-27 (1992). If anything, therefore, the doctrine of "judicial self-restraint" militates in favor of analyzing Swisher's claim under the Takings Clause, not the Due Process Clause. *Collins*, 503 U.S. at 125; *cf. Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995).

Finally, Justice Scalia's comments in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), explain cogently why the Takings Clause is a proper vehicle for claims such as Swisher's. In that case, Justice Scalia observed that typical rent control schemes – through which landlords are limited in the rents that they may charge tenants – do not effect an unconstitutional taking because "there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy." *Id.* at 20 (Scalia, J., dissenting). "When commodities have been priced at a level that produces

exorbitant returns, the owners of those commodities can be viewed as responsible for the economic hardship that occurs." *Id.* But a rent control law that purports to limit the ability of a landlord to charge a fair rent merely because a tenant cannot afford to pay violates the Takings Clause because "*that* problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages * * * *" *Id.* at 21 (emphasis in original).

To be sure, as Justice Scalia emphasized, the government always remains free to enact a welfare scheme through which rent subsidies are provided to needy tenants. But to survive Takings Clause scrutiny, such welfare schemes must be "supported by all the public" and funded by "the government at large through taxes," and must not "disproportionately burden particular individuals." *Id.* at 21-22. The "essence" of the Takings Clause "is simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation." *Id.* at 23.

II. THE ELEVENTH CIRCUIT'S MISUNDERSTANDING OF APPLICABLE DUE PROCESS PRINCIPLES HEIGTHTENS THE SIGNIFICANCE OF ITS UNDULY NARROW READING OF THE TAKINGS CLAUSE

In reaching its conclusion that monetary assessments do not implicate the Takings Clause, the Eleventh Circuit relied heavily on Justice Kennedy's concurring opinion in *Apfel*. Ironically, however, the Eleventh Circuit did not similarly heed the view that Justice Kennedy – as well as the four dissenting Justices in *Apfel* – expressed regarding the critical role of the Due Process Clause serves in protecting against the imposition of disproportionate burdens on private

parties to solve social problems with which they have no meaningful connection.

A. "Retroactivity" Is Not a Required Element of a Due Process Clause Challenge to a Monetary Assessment Scheme

As discussed in Section I.A, *supra*, post-*Apfel* courts continue to struggle with whether Justice Kennedy's concurrence constitutes a binding holding on the Takings Clause issue. None of these courts have focused, however, on the fact that the four dissenting Justices in *Apfel* also endorsed the affirmative aspect of Justice Kennedy's opinion: that the Due Process Clause requires robust scrutiny of monetary assessment schemes that are "fundamentally unfair or unjust." *Id.* at 558 (Breyer, J., dissenting). As Justice Breyer emphasized, the mandate for such scrutiny flows from the "basic purpose" the Due Process Clause: "the *fair application of the law*, which purpose hearkens back to the Magna Carta." *Id.* (emphasis in original).

In this case, rather than considering FETRA's unusual and fundamentally problematic character, the court's Due Process analysis focused almost exclusively on whether FETRA is "retroactive." This emphasis on retroactivity was mistaken. The Due Process Clause requires a sufficient *nexus* between the private party whose property is taken and the problem being addressed, and sufficient *proportionality* between the party's responsibility for the problem and the burden that is imposed. As this Court's Due Process Clause jurisprudence makes clear, retroactivity is one way – but only one way – in which this requirement of connection and proportionality can be defeated.

For example, this Court's recent punitive damages precedents have held that "grossly excessive" awards violate tortfeasors' Due Process rights. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *Cooper*

Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-34 (2003). The most important indicator of excessiveness is the ratio of the award "to the actual harm inflicted on the plaintiff." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580-82 (1996). This inquiry is constitutionally required because it "'helps to assure uniform general treatment of similarly situated persons that is the essence of law itself.'" *Cooper Industries*, 532 U.S. at 436 (quoting *Gore*, 517 U.S. at 587 (Breyer, J., concurring)).

Cases concerning a State's power to tax out-of-state activities are also instructive. This Court has held that the Due Process Clause requires a "definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) (quotation omitted). It forbids States from imposing taxes on parties that do not enjoy the "opportunities, benefits, or protection" the State affords. *Ott v. Mississippi Val. Barge Line Co.*, 336 U.S. 169, 174 (1949). This rule derives from the fundamental principle that the Due Process Clause demands the "requisite 'nexus'" between the ends served by a regulation and those subjected to it. *Mobile Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 437 (1980).

These punitive damages and taxation cases confirm that whether a narrowly targeted assessment scheme is "retroactive" is not dispositive – or even particularly significant – to whether it comports with Due Process. None of the statutes or awards that have been struck down in these cases were "retroactive." Rather, the case law focuses on the sufficiency of the nexus and the proportionality of the money paid to the benefit the defendant obtained or the harm it caused.

The connection between Swisher and the beneficiaries of FETRA is even more tenuous, and the impact upon Swisher even more disproportionate, than the statute at issue in *Apfel*. As Justice Stevens observed in that case, there was

at least an "implicit understanding" between coal operators and miners – one that "enabled coal production to continue during the 1950's and 1960's" – that companies like Eastern "would provide the miners with lifetime health benefits." 524 U.S. at 551 (Stevens, J., dissenting). And as Justice Breyer emphasized, the Coal Act "extends only to miners whom Eastern itself employed." *Id.* at 559-61 (Breyer, J., dissenting).

The question raised here – "why Swisher?" -- yields an answer that is far more constitutionally problematic than the one presented in *Apfel*. *Id.* at 558 (Breyer, J., dissenting) ("The 'fairness' question is, why Eastern?"). Although FETRA is similar to the Coal Act in that it imposes onerous burdens on one narrow class of private parties for the benefit of another, there is no suggestion that Swisher or other cigar manufacturers ever promised tobacco price support program beneficiaries (whether expressly or implicitly) that they would fund a "cushion" if the program were ever repealed, nor did Swisher have any employment relationship or other significant privity with the program beneficiaries. Indeed, Swisher's liability to pay FETRA assessments has nothing to do with its past, present, or future connection to the domestic tobacco market. Liability is based solely on its share of current domestic sales – regardless whether it manufactures products with tobacco purchased domestically or overseas, and regardless whether it uses or ever used the kind of tobacco that formerly was subject to quotas and price supports.

FETRA therefore is even worse than "retroactive." At least the Coal Act was based on *some* connection – albeit a past connection – between the burdened and the benefited. In this case, there simply is no meaningful connection *at all*. *See id.* at 560 (Breyer, J., dissenting) (explaining that Coal Act was *more* defensible than a statute that raised money from "other funding sources, say, current coal producers or

coal consumers, who now make or use coal but who have never employed that miner or benefited from his work").

The lack of proportionality is likewise even more pronounced in this case than it was in *Apfel*. Swisher's FETRA liability is more than an order of magnitude greater than what it would have been if assessments were allocated based on past participation in the tobacco price support program.

The lower court's misplaced focus on "retroactivity" blinded it to numerous other unusual and constitutionally troubling attributes of FETRA. For one thing, unlike the Coal Act, FETRA takes money from companies that were *burdened* by the price support program in the past and transfers it to participants who *benefited* from it. *Cf.* 524 U.S. at 560 (Breyer, J., dissenting) (observing that miners' labor "benefited Eastern when they were younger and healthier").

Nor does Swisher derive any prospective benefit – let alone a proportional one – from the buyout it is being compelled to underwrite because there is no requirement that beneficiaries continue to produce tobacco in the coming years. Producers may opt to begin growing other, more lucrative crops, and still collect their FETRA payments. Indeed, the scheme affirmatively erects significant barriers to entry because new entrants into the "free" tobacco market are not eligible for FETRA payments (which are based exclusively on 2002 production levels) and thus face the prospect of a ten-year competitive disadvantage.

Perhaps most significantly, FETRA is funded out of money taken from a narrow class of private parties, rather than from the general treasury. This does not merely offend the core principle that the government should not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). It circumvents the orderly lawmaking process, thereby nullifying the significant protections that are built into the

political system. As Justice Scalia explained in *Pennell*, allowing the government to fund social welfare objectives by selectively burdening private parties "permits them to be achieved 'off-budget,' with relative invisibility and thus relative immunity from normal democratic processes." 485 U.S. at 22 (Scalia, J., dissenting). The wisdom of such schemes should be debated "during the process of taxing and spending, where both economic effects and competing priorities are more evident." *Id.* at 23; *cf. West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994) (observing that "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political process can no longer be relied upon to prevent legislative abuse").

Here, it requires no great stretch of the imagination to suppose that, contrary to their acquiescence in the enactment of FETRA, the cigarette companies would have strenuously opposed funding the price support program buyout through an increase in excise taxes, which would not have triggered the offset provision in their settlement agreement with the States. Moreover, lawmakers may well have been reluctant to divert excise tax dollars – which are paid to the general treasury – from the myriad other competing programs that they and their constituents believe merit funding.

As in *Apfel*, there is no question that the purpose underlying FETRA – softening the blow to program beneficiaries who have relied on quotas and price supports for decades – is a rational and legitimate one. But the government's approach to funding the buyout is no fairer, no more just, and no more constitutional than funding the rebuilding of New Orleans after Hurricane Katrina by imposing monetary "assessments" on businesses in Grand Rapids, Michigan.

B. The Lower Court's Focus on "Retroactivity," Coupled With Its Restrictive View of the Takings Clause, Leaves a Wide and Dangerous Gap In the Fifth Amendment's Protection Against Abuses of Power

Although each of the errors discussed above would warrant this Court's attention independently, the cumulative effect of the Eleventh Circuit's two holdings makes review even more important.

In *Apfel*, the disagreement between the plurality and the concurrence with respect to the appropriate constitutional lens for examining the Coal Act, although important in its own right, was not outcome-determinative. Many of the factors that led the plurality to conclude that the Coal Act violated the Takings Clause were relevant to Justice Kennedy's Due Process analysis, 524 U.S. at 547-50 (Kennedy, J., concurring), and both opinions found these characteristics sufficient to conclude that the Coal Act violated the Fifth Amendment.

Under the Eleventh Circuit's analysis, by contrast, the consequence of concluding that the Takings Clause is not the appropriate vehicle for examining an assessment scheme almost automatically means it must be upheld (unless it happens to be "retroactive"). This leaves a gaping hole in the protection afforded by the Fifth Amendment, one that precludes meaningful scrutiny of even the prototypically unconstitutional scheme: taking from A for the purpose of giving to B. *Calder v. Bull*, 3 U.S (3 Dall.) 386, 388 (1798) (holding that it is "contrary to the great first principles of the social compact," and "against all reason and justice," to tolerate a "law that takes property from A. and gives it to B"). Because that obviously cannot be the law, something is gravely amiss.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

May 2009

ANDREW G. CELLI, JR.*
ERIC HECKER
Emery Celli Brinckerhoff & Abady LLP
75 Rockefeller Plaza,
20th FloorNew York, NY 10019
(212) 763-5000

* *Counsel of Record*

APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Eleventh Circuit

No. 07-15886

SWISHER INTERNATIONAL, INC.,

Plaintiff,

v.

ED SCHAFER,
Secretary of Agriculture,

Defednant.

Argued: September 9, 2008
Decided: December 3, 2008

Before ANDERSON, BARKETT, and COX, *Circuit Judges.*

ANDRESON, *Circuit Judge*.

Swisher International, Inc. ("Swisher") appeals the district court's grant of summary judgment in favor of Edward T. Schafer, Secretary of Agriculture (the "Secretary").[1] Swisher alleged that the Fair and Equitable Tobacco Reform Act of 2004, 7 U.S.C. §518 *et seq.* (the "Act") and its implementing procedures violate the Takings and Due Process Clauses of the Fifth Amendment and Swisher's constitutional right to equal protection. The Act transforms the heavily regulated and subsidized tobacco production system into a free market system. As part of the transition process, the Act provides a buyout for tobacco farmers and tobacco quota holders. The buyout is funded through quarterly assessments levied on tobacco manufacturers and importers selling tobacco products in the domestic market. Swisher believes that these assessments violate the Constitution. We have determined that the Takings Clause does not apply to Swisher's mere obligation to pay an assessment. We hold that Swisher's obligations under the Act do not violate the Due Process Clause or Swisher's equal protection rights. We affirm the district court's summary judgment in favor of the Secretary.

I. BACKGROUND

In 1938, Congress began regulating tobacco growers by establishing a system of quotas and price supports. The price support system was managed by the Commodity Credit Corporation ("CCC"). The type of tobacco used in the production of cigarettes has been the historical focus of the price support system. Swisher, as a cigar manufacturer, purchased less than one percent of its tobacco through the

---

[1] Edward T. Schafer has been substituted as the appellee because he replaced former Secretary Mike Johanns, the named defendant in the district court opinion.

price support system in 1999-2004, averaging 0.031% percent of the total tobacco sold through the program in each year.

When the CCC began to sustain losses as a result of operating the program, Congress required tobacco importers, buyers, and producers to make payments to a fund that covered the losses. By the early part of this century, Congress determined that the price support system was no longer in the best interest of the industry. In 2004, the President signed into law the Fair and Equitable Tobacco Reform Act, 7 U.S.C. § 518 *et seq*. The Act dismantled the tobacco quotas and price supports that had been in place since 1938 and created a program to help tobacco farmers make the transition to a free market system. The Act works as a buyout of tobacco growers, taking place over ten years and financed by payments from tobacco manufacturers and importers.[2]

Under the Act, the Department of Agriculture determines the assessments owed by each manufacturer using a two-step process. First, the total yearly assessment is divided among six classes of tobacco manufacturers (cigarettes, cigars, snuff, roll-your-own, chewing tobacco, and pipe tobacco), based on their market share in the preceding calendar year quarter. 7 U.S.C. §518d(b)(1), (e)(1). The percentage of the total yearly assessment for which each class is responsible was statutorily established for fiscal year 2005, but the Secretary has the authority to adjust the percentages in subsequent years. *Id.* §518d(c)(1)-(2). The market share for each class is determined by multiplying each class's tobacco volume by the excise taxes paid by that class in the prior year. 7 C.F.R. §§1463.3, 1463.4. For all classes of tobacco except cigars, the actual excise tax rates are used to calculate market share. *Id.* §1463.7(c). Because the excise tax rate for cigars varies,

---

[2] The Act also relieves cigarette manufacturers of some of their liability under a settlement agreement with 47 state attorneys general regarding recovery of health care costs related to smoking. The settlement agreement provided that settlement payments would be cancelled on a dollar-for-dollar basis if the federal government enacted an industry-funded tobacco grower buyout.

the market share for cigar manufacturers is calculated using the maximum excise tax rate and the number of units sold. Determination of the market share of each tobacco class is referred to as "Step A."

Once the market share for each class has been determined, the Secretary allocates the percentage of the total assessment owed by each class among individual manufacturers and importers. 7 C.F.R. §1463.7(d). For cigarette and cigar sellers, the individual assessments are determined by the number of cigarettes and cigars sold. 7 U.S.C. §518d(g)(3)(A). For the remaining classes of tobacco products, the number of pounds of tobacco is used to determine the assessments. *Id.* §518d(g)(3)(B). This determination is referred to as "Step B."

Swisher paid $11 million in the first year of the program. Swisher anticipates its total assessments over the ten years will be in excess of $100 million. In 2005, Swisher filed suit against the Department of Agriculture, challenging the constitutionality of the Act. The district court granted summary judgment in favor of the Secretary, and Swisher now appeals.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo*. *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 836 (11th Cir. 2006). Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of fact and compels judgment as a matter of law. Fed. R. Civ. P. 56(c); *Holloman*, 443 F.3d at 836.

III. DISCUSSION

Both parties rely upon *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998). We agree that *Eastern*

Enterprises and its progeny provide significant guidance for this case. Thus, we first analyze that case to arrive at a rule of decision for this case. Then we determine whether Swisher's rights were violated under the Due Process Clause of the Fifth Amendment. Finally, we determine whether the methodology for apportioning the assessments violates Swisher's equal protection rights under the Fifth Amendment.

A. Analysis of Eastern Enterprises and Determination of a Rule of Decision for this Case

In *Eastern Enterprises*, the Supreme Court considered challenges to the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act") under the Due Process and Takings Clauses of the Constitution. 524 U.S. at 503-04, 118 S. Ct. at 2137 (plurality opinion). The Coal Act assigned retirees to previous employers according to a statutory formula, requiring the employers to pay premiums into the Combined Fund to cover benefits for the retirees. *Id.* at 514-15, 118 S. Ct. at 2141- 42. By 1965, Eastern had transferred all of its coal-related operations to a subsidiary and was no longer involved in the industry. *Id.* at 516, 118 S. Ct. at 2143. Following the Coal Act's enactment, Eastern was assigned the obligation for premiums regarding over 1,000 retired miners who had worked for the company before 1966, with the premiums for a 12-month period exceeding $5 million. *Id.* at 517, 118 S. Ct. at 2134. Eastern asserted that the Coal Act violated substantive due process and constituted a taking of its property. *Id.*

1. Justice O'Connor's plurality opinion concluded that application of the Coal Act to Eastern violated the Takings Clause

The plurality applied the Takings Clause and concluded "that the Coal Act's allocation of liability to Eastern violates the Takings Clause, and . . . should be enjoined as applied to

Eastern." *Id.* at 538, 188 S. Ct. at 2153. The case did not involve a classic taking in which private property is taken by the government for its own use. *Id.* at 522, 118 S. Ct. at 2146. Although not the traditional takings model, the plurality asserted that economic regulation such as the Coal Act can amount to a taking. *Id.* at 522-23, 118 S. Ct. at 2146. The party challenging a governmental action as a taking has a heavy burden because government regulations often curtail some use of private property, and not every destruction of property is a taking in the constitutional sense. *Id.* at 523, 118 S. Ct. at 2146.

"[T]he process for evaluating a regulation's constitutionality involves an examination of the 'justice and fairness' of the governmental action." *Id.* The inquiry is essentially ad hoc and fact intensive, and the Court has found three factors to have particular significance: "[T]he economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Id.* at 523-24, 118 S. Ct. at 2146 (alteration in original). The plurality noted that its prior decisions give Congress a lot of leeway to create economic legislation, including the power to impact contracts between parties and to impose a certain degree of retroactive legislation. *Id.* at 528, 118 S. Ct. at 2149. However, the plurality stated that its decisions "left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of the liability is substantially disproportionate to the parties' experience." *Id.* at 528-29, 118 S. Ct. at 2149.

The plurality determined—by applying the three factor test used in regulatory takings analysis—that the Coal Act's allocation scheme, as applied to Eastern, constituted a taking. *Id.* at 529, 118 S. Ct. at 2149. In discussing the first factor, economic impact, the plurality concluded that there was no doubt that the Coal Act placed a significant financial burden on Eastern. *Id.* Eastern's cumulative payments under the Coal

Act were estimated to be between $50 and $100 million. *Id.* The plurality indicated "that an employer's statutory liability for multiemployer plan benefits should reflect some proportion[ality] to its experience with the plan." *Id.* at 530, 118 S. Ct. at 2149 (alteration in original) (internal quotations omitted). Eastern's liability under the Coal Act was based solely on its previous employees from 30 to 50 years before the enactment of the Act, "without any regard to responsibilities that Eastern accepted under any benefit plan the company itself adopted." *Id.* at 531, 118 S. Ct. at 2150.

With respect to the second factor, the plurality determined that "the Coal Act substantially interfere[d] with Eastern's reasonable investment-backed expectations." *Id.* at 532, 118 S. Ct. at 2151. "Retroactivity is generally disfavored in the law . . . ." *Id.* The legislation reached back between 30 to 50 years to impose liability on Eastern based on prior actions. *Id.* Although the Act only mandated the payment of future benefits, it attached new liability based on an employment relationship that had terminated long before the Act's enactment. *Id.* Retroactive legislation brings up "fundamental notions of justice" and issues of fairness "because it can deprive citizens of legitimate expectations and upset settled transactions." *Id.* at 532-33, 118 S. Ct. at 2151. The Coal Act's retroactive liability is particularly far-reaching, "divesting Eastern of property long after the company believed its liabilities under" its prior agreement had been settled. *Id.* at 534, 118 S. Ct. at 2152. Substantial questions of fairness are raised by reaching so far into the past to impose liability. *Id.* Although Congress' attempt to protect miners was noble, "the Constitution does not permit a solution to the problem of funding miners' benefits that imposes such a disproportionate and severely retroactive burden upon Eastern." *Id.* at 536, 118 S. Ct. at 2153.

Regarding the third factor, the plurality determined that "the nature of the governmental action in this case [was] quite unusual." *Id.* at 537, 118 S. Ct. at 2153. Congress sought to find a legislative remedy to the major problem of funding for

miners' benefits; however, the solution singled out Eastern based on its conduct far in the past, and without any relationship to any commitment made by the employers or any injury Eastern caused. *Id.* The governmental action was problematic in regards to "fundamental principles of fairness underlying the Takings Clause." *Id.* The plurality concluded that, under the specific facts of the case, application of the Coal Act to Eastern was an unconstitutional taking. *Id.* The plurality acknowledged that there was a correlation between the analysis under the Takings and Due Process Clauses, but O'Connor noted the Court's "concerns about using the Due Process Clause to invalidate economic legislation." *Id.*

2. Justice Kennedy's concurrence concluded that application of the Coal Act to Eastern was unconstitutional under the Due Process Clause

Justice Kennedy concurred in the judgment. *Id.* at 538, 118 S. Ct. at 2154 (Kennedy, J., concurring in the judgment and dissenting in part). However, Justice Kennedy argued that the plurality was wrong to conclude that the Coal Act took property because the regulation was without regard to property. *Id.* at 540, 118 S. Ct. at 2154. The Coal Act did not operate on or alter an identified property interest, and it was not measured by property interests. *Id.* "The law simply imposes an obligation to perform an act, the payment of benefits," and to the extent that the regulation affects property interests, it is similar to many laws that have never before been considered takings. *Id.* Kennedy reasoned that, because "the constitutionality of the Coal Act appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation, . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." *Id.* at 545, 118 S. Ct. at 2157 (citation omitted).

Justice Kennedy concluded that principles forbidding retroactive legislation were sufficient to show that there was a

violation of the Due Process Clause. *Id.* at 547, 118 S. Ct. at 2158. Although the Court has been hesitant to subject economic legislation to due process analysis, the Court has been willing to look more closely with regard to retroactive legislation. *Id.*

Due process analysis requires an inquiry into whether the legislature acted in an arbitrary and irrational way in enacting the retroactive law. *Id.* Although prospective legislation carries a presumption of constitutionality, that does not mean that Congress can automatically legislate retroactively that which it could have legislated prospectively. *Id.* at 547-48, 118 S. Ct. at 2158. "Both stability of investment and confidence in the constitutional system . . . are secured by due process restrictions against severe retroactive legislation." *Id.* at 549, 118 S. Ct. at 2159.

Justice Kennedy concluded that the case represented "one of the rare instances where the Legislature . . . exceeded the limits imposed by due process." *Id.* The remedy in the Coal Act, as applied to Eastern, "bears no legitimate relation to the interest which the Government asserts in support of the statute." *Id.* The unprecedented scope of retroactivity was a significant determinant in the unconstitutionality of the statute. *Id.* Liability of former employers has been upheld when the statutes were remedial, but this statute was not remedial because Eastern was not responsible for the expectation of lifetime health benefits for retired miners. *Id.* at 550, 118 S. Ct. at 2159. The expectation of lifetime benefits was created by agreements made long after Eastern had left the coal business. *Id.* This case represented the rare instance in which the severe retroactive application of legislation is so egregious as to violate the due process clause. *Id.*[3]

---

[3] The four dissenters agreed with Justice Kennedy that due process, rather than takings, was the appropriate framework for analysis. They held: "The Constitution's Takings Clause does not apply." *Id.* at 554, 118 S. Ct. at 2161 (Breyer, J., dissenting). This is so, according to the dissent, because the Takings Clause is primarily concerned not with "preventing arbitrary

3. Is either the plurality opinion or Justice Kennedy's concurrence controlling?

As indicated above, the decision in *Eastern Enterprises* constitutes a fragmented decision in which the five Justices concurring in the judgment did not agree upon a single rationale to explain the result. In such a case, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 993 (1977).

We note that the Supreme Court has commented that the *Marks* inquiry "has so obviously baffled and divided the lower courts." *Nichols v. United States*, 511 U.S. 738, 746, 114 S. Ct. 1921, 1927 (1994); *see also Grutter v. Bollinger*, 539 U.S. 306, 325, 123 S. Ct. 2325, 2337 (2003). Courts of appeal have applied several different formulations of the *Marks* rule. Although this Court has recently applied one particular formulation, *United States v. Robison*, 505 F.3d 1208, 1219-22 (11th Cir. 2007),[4] we need not in this ca 4 se apply any particular formulation. This is so because Justice O'Connor's opinion for the plurality in *Eastern Enterprises*

---

or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." *Id.*

[4] In *Robison*, we addressed the "narrowest ground" of the five Justice majority opinion in *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208 (2006). The issue in *Rapanos* and *Robison* involved the definition of "navigable waters" which in turn determined the jurisdiction of the Clean Water Act. We held that the narrowest ground was the least farreaching: "The issue becomes whether the definition of 'navigable waters' in the plurality or concurring opinions in *Rapanos* was less far-reaching (i.e., less restrictive of CWA jurisdiction)." *Robison*, 505 F.3d at 1221. Because Justice Kennedy's test would "classify a water as 'navigable' more frequently than Justice Scalia's test," we determined that Justice Kennedy's test constituted the "narrowest grounds," the one less restrictive of the application of the federal statute, and thus constituted the binding rule of decision for *Robison*. *Id.* at 1221-22.

would not constitute binding authority (i.e., would not constitute the narrower ground) under any of the several formulations of the *Marks* inquiry.[5] We need not decide

---

[5] Under the formulation applied in *Robison*, it is probable that Justice Kennedy's concurring opinion in *Eastern Enterprises*, and not Justice O'Connor's plurality opinion, would be considered the narrower of the two standards. It is probable that his standard would be less far-reaching, i.e., less restrictive of the application of the federal Coal Act legislation. In other words, especially in light of the extremely high threshold that courts require before finding a substantive due process violation, it is probable that Justice Kennedy's standard would less frequently result in a conclusion that the Coal Act was unconstitutionally applied. See Eastern Enterprises, 524 U.S. at 542, 118 S. Ct. at 2155 (Kennedy, J., concurring in the judgment and dissenting in part) (noting that the plurality's opinion "would expand an already difficult and uncertain rule to a vast category of cases not deemed, in our law, to implicate the Takings Clause. . . . The plurality opinion would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts."). Whether or not Justice Kennedy's concurrence is the narrower ground under the *Robison* formulation, a matter that we need not and do not decide in this case, we are confident that Justice O'Connor's plurality opinion is not the narrower ground, and thus is not binding precedent.

Other courts of appeal have held that neither Justice O'Connor's plurality opinion nor Justice Kennedy's concurrence are binding, because neither can meaningfully be regarded as "narrower" than the other, neither opinion being a logical subset of the other. Thus no common denominator can be said to exist commanding the support of five Justices concurring in the judgment. *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *Anker Energy Corp. v. Consol. Coal Co.*, 177 F.3d 161, 169-70 (3d Cir. 1999); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998). Under these cases, neither opinion is binding, and thus under this formulation, Justice O'Connor's plurality opinion would of course not be binding.

Other courts of appeal have indicated that they are bound to follow the five Justices in *Eastern Enterprises* who concluded that the takings analysis was not appropriate; therefore, those courts applied substantive due process. Those courts of appeal rely upon the fact that Justice Kennedy and the four dissenting Justices all indicated that a takings analysis was not appropriate. *See Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (en banc); *Parella v. Ret. Bd.*

whether Justice Kennedy's concurrence constitutes the narrower ground, because we can assume *arguendo* that neither opinion constitutes the narrower ground, thus leaving us without binding authority, and leaving us with the obligation to independently evaluate the case law and determine for ourselves which approach is more consistent with the case law and more plausible. As elaborated below, our independent evaluation leads us to conclude that the takings analysis is not appropriate for this case.

Our independent evaluation of the case law leads us to agree with Justice Kennedy that the takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed by Congress merely to pay money. In the Supreme Court case, Eastern Enterprises challenged the power of Congress to require that it contribute to the funding of heath care benefits for retirees in the coal industry, a mere obligation to pay money. Similarly, in the instant case, Swisher challenges the power of Congress to impose upon it assessments under the Fair and Equitable Tobacco Reform Act as a contribution toward the funding of the buyout of tobacco growers and the transition to the free market system – again a mere obligation to pay money. As Justice Kennedy pointed out, such an obligation

> does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank

---

of R.I. Employees' Ret. Sys., 173 F.3d 46, 58 (1st Cir. 1999). Of course, this latter formulation is inappropriate in this circuit, the law of our circuit being clear that a combination of five Justices, some in the majority and some in the dissent, does not constitute binding precedent. *See Robison*, 505 F.3d at 1221. In any event, under none of the foregoing formulations would Justice O'Connor's plurality opinion in *Eastern Enterprises* constitute binding precedent.

> account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.

Eastern Enterprises, 524 U.S. at 540, 118 S. Ct. at 2154 (Kennedy, J., concurring in the judgment and dissenting in part).[6]

---

[6] In support of its position that the takings analysis is appropriate, Swisher relies upon *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 118 S. Ct. 1925 (1998), *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S. Ct. 446 (1980), and *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S. Ct. 1018 (1986). *Phillips* and *Beckwith* are readily distinguishable. Both involve specific, identifiable, property interests which were invaded by the governmental action. *Phillips* involved the appropriation by the state of Texas of the interest earned on IOLTA accounts (Interest on Lawyers Trust Account). 524 U.S. at 159-60, 118 S. Ct. 1927-28. Under that program in Texas, and other states, certain client funds held by an attorney were deposited in bank accounts, and the statute provided that the interest generated by such funds was to be paid to a foundation to finance legal services for lower income individuals. *Id.* at 160, 118 S. Ct. at 1928. Similarly, in *Beckwith*, the state statute provided that the clerk of each county court should invest funds deposited in the registry of the court (e.g., in interpleader cases) in interest bearing bank accounts and that all interest accruing from such monies shall be deemed the income of the office of the clerk. 449 U.S. at 156 n.1, 101 S. Ct. at 448 n.1. Thus, both *Phillips* and *Beckwith* involved an invasion of specific identifiable property. In *Connolly*, appellants brought a Takings Clause challenge to a provision of the Multiemployer Pension Plan Amendments Act of 1980 which required an employer withdrawing from a multiemployer pension plan to pay a fixed and certain debt to the plan amounting to the employer's proportionate share of the plan's unfunded vested benefits. 475 U.S. at 221-23, 106 S. Ct. at 1024-25. Although appellants did not emphasize their property interest, the case did involve at least the semblance of a property interest. Prior to the enactment of the statute, an employer's sole obligation to the pension trust was to pay a fixed contribution required by the collective bargaining agreement. *Id.* at 218, 106 S. Ct. at 1022. The agreement clearly stated that the employer's obligation for pension benefits was ended when the employer paid the specified contribution. *Id.* Thus, *Connolly* is distinguished from the instant case in that there is no semblance of a property interest involved in this case. Moreover, the takings analysis conducted by the Supreme Court in *Connolly* merely reinforced the Court's belief "that the imposition of withdrawal liability does not

Swisher's argument in this case challenges the very power of Congress to impose the obligation at issue upon Swisher. In other words, Swisher asserts "a substantive or absolute limit on the government's power to act." *Id.* at 545, 118 S. Ct. at 2157. As Justice Kennedy points out, the Takings Clause, by its plain language, does not operate as a substantive or absolute limit on the government's power; rather, it operates only as a conditional limitation, permitting the taking so long as the government pays just compensation. As the Supreme Court stated in 1987:

> As its language indicates, and as the Court has frequently noted, this provision [the Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-15, 107 S. Ct. 2378, 2385-86 (1987) (citations omitted).

In addition to the plain language of the Takings Clause, the case law following *Eastern Enterprises* supports the proposition that the takings analysis is not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation without regard to an identifiable property interest. In *Givens v. Alabama Department of Corrections*, 381 F.3d 1064 (11th Cir. 2004), we held that an Alabama inmate had no private property interest in the interest earned on the monies deposited in a bank account in the inmate's name into which earnings of the inmate pursuant to the work-release program were deposited. *Id.* at 1070. Because "no recognized property interest is implicated here, . . . there is no

---

constitute a compensable taking under the Fifth Amendment." *Id.* at 225, 106 S. Ct. at 1026.

'taking.'" *Id.* Similarly, in the post-*Eastern Enterprises* cases construing the Coal Act, and in analogous contexts, several circuit courts of appeals have applied a substantive due process analysis, rather than a takings analysis.[7] Moreover,

---

[7] *See Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999) ("[W]e believe that due process analysis encompasses the relevant concerns."); *see also Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339-40 (Fed. Cir. 2001) (en banc) (holding that a congressional imposition of an obligation to pay money does not constitute an unconstitutional taking of property, in a case challenging the special monetary assessments on domestic utilities for remediation of environmentally contaminated uranium processing facilities, the court rejected a Takings Clause challenge to the Energy Policy Act of 1992, citing *Eastern Enterprises* as well as previous Federal Circuit precedent); *Parella v. Ret. Bd. of R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (holding, in the context of a Takings Clause challenge to a Rhode Island statute capping annual pension benefits of retired legislators, that plaintiffs must prove the deprivation of a property right to support a Takings Clause claim, relying upon *Eastern Enterprises* and previous First Circuit cases).

However, other post-*Eastern Enterprises* cases construing the Coal Act have analyzed the claim employing both a Takings Clause analysis and a substantive due process analysis. Those cases have held that neither Justice O'Connor's opinion nor Justice Kennedy's constitutes binding precedent, and that the only binding aspect of the splintered decision is its specific result. See *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *see also Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998). Incidentally, all of the post-*Eastern Enterprises* cases construing the Coal Act have upheld the statute as applied to the parties challenging same. *See Bituminous Contractors*, 156 F.3d at 1257 ("The clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements [which agreements first gave rise to the reasonable expectation of lifetime benefits] represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability . . . .").

On the other hand, the Fifth Circuit in *United States Fidelity & Guaranty Co. v. McKeithen*, 226 F.3d 412 (5th Cir. 2000), did find a violation of the Takings Clause where a Louisiana statute imposed severe retroactive liability on a class of insurers who had withdrawn from (or substantially reduced their participation in) the Louisiana market prior to

that the takings analysis is not appropriate in this case is supported by persuasive authority. Five Supreme Court Justices have expressed the view that the Takings Clause does not apply where there is a mere general liability (i.e., no separately identifiable fund of money) and where the challenge seeks to invalidate the statute rather than merely seeking compensation for an otherwise proper taking. *Eastern Enterprises*, 524 U.S. at 539-47, 118 S. Ct. at 2154-58 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-56, 118 S. Ct. at 2161-63 (Breyer, J., joined by Stevens, J., Souter, J., and Ginsburg, J., dissenting).[8]

Accordingly, we conclude that it would be inappropriate in this case to apply a takings analysis.[9] This leaves only Swisher's substantive due process challenge.

---

the passage of the statute. However, the Fifth Circuit decision is not inconsistent with our decision today. The Fifth Circuit noted that Justice Kennedy declined to apply a takings analysis because there was no identifiable property interest at issue in *Eastern Enterprises*. *Id.* at 420. Because *McKeithen* did involve an identifiable property interest, the Fifth Circuit concluded that Justice Kennedy's concern about the applicability of a takings analysis was moot in the Fifth Circuit case. *Id.* Moreover, the Fifth Circuit concluded that Justice Kennedy's reasoning was otherwise in harmony with that of Justice O'Connor's plurality opinion in *Eastern Enterprises*. *Id.*

[8] We have held that there is no binding precedent when five Justices have expressed a common view, when some are in the majority and some are in the dissent. *Robison*, 505 F.3d at 1221. Although not binding precedent, the common view of five Justices obviously carries persuasive authorities.

[9] Indeed, to apply a Takings Clause analysis in the instant case would constitute an even greater expansion of takings jurisprudence than Justice O'Connor's plurality opinion in *Eastern Enterprises*. There, at least there was some semblance of a property interest involved. The collective bargaining agreement which Eastern did sign in 1950 provided for a fixed 30- cents-per-ton royalty on coal produced as the contribution to be made by signatory operators. *Eastern Enterprises*, 524 U.S. at 506, 118 S. Ct. at 2138 (plurality opinion). Moreover, the contractual obligation to contribute expired with the expiration of the particular collective bargaining agreement. Thus, in *Eastern Enterprises*, the statutory

B. Whether the Obligation to Pay Assessments under the Act Violates Swisher's Due Process Rights

Having determined that a takings analysis is not appropriate in this case, we turn to Swisher's argument that the Act violates its right to due process because it imposes retroactive liability that is disproportionate to Swisher's participation in the price support program. Economic legislation "come[s] to the Court with a presumption of constitutionality." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 2892 (1976). To prove that a statute violates its due process rights, the aggrieved party must demonstrate that the legislature has acted arbitrarily and irrationally. *Id.* at 15, 96 S. Ct. at 2892. However, if the government can show that the statute has a "legitimate legislative purpose furthered by rational means," due process is satisfied. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S. Ct. 1105, 1112 (1992). When a statute has a retroactive effect, the government must also prove that the statute's retroactive application furthers a legitimate legislative purpose. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S. Ct. 2709, 2718 (1984).

As is apparent from our discussion above summarizing Justice Kennedy's substantive due process analysis in *Eastern Enterprises*, the primary factor which led to the holding that the Coal Act was unconstitutional was the fact that the Coal Act imposed upon Eastern Enterprises a retroactive obligation "of unprecedented scope." 524 U.S. at 549, 118 S. Ct. at 2159. The crucial difference between the instant case and *Eastern Enterprises* is that the obligation imposed upon Swisher in the instant case is not retroactive. The Act provides:

---

assessment might well have been deemed to have been inconsistent with Eastern's contractual obligation, and an impairment of its property interest in that contract. By contrast, in the instant case, there is no semblance of a property interest; there is no contract limiting Swisher's obligations.

> The Secretary, acting through the Commodity Credit Corporation, shall impose quarterly assessments during each of fiscal years 2005 through 2014, calculated in accordance with this section, on each tobacco product manufacturer and tobacco product importer that sells tobacco products in domestic commerce in the United States during that fiscal year.

7 U.S.C. § 518d(b)(1). Under the plain meaning of the language of the statute, *every* tobacco manufacturer and importer currently participating in the domestic tobacco market is subject to the assessments. Accordingly, a new manufacturer or importer would be subject to an assessment under the statute as a cost of doing business in the industry. Contrary to Swisher's argument, the plain language of the statute clearly indicates that the assessments are not based upon the past conduct of tobacco manufacturers or importers.[10] Quite the contrary, the assessment is based upon current participation in the market, such that new entrants are assessed, as well as those who participated in the past.

Stripped of its argument that the Act is retroactive, Swisher's due process challenge is readily disposed of as being wholly without merit. We note again that congressional legislation "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Turner Elkhorn*, 428 U.S. at 15, 96 S. Ct. at 2892. "Statutes may be invalidated on due process grounds only under the most egregious of circumstances." *Eastern Enterprises*, 524 U.S. at 550, 118 S. Ct. at 2159 (Kennedy, J., concurring in the judgment and dissenting in

---

[10] It is true that a person must "demonstrate to the satisfaction of the Secretary that the person is a tobacco quota holder" in order to be eligible to receive a contract payment under the statute. 7 U.S.C. § 518a(b). However, the fact that recipients of the payments must show they were quota holders does not imply that the obligation to pay assessments is based on past participation in the quota system.

part). So long as congressional legislation "is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *R.A. Gray*, 467 U.S. at 729, 104 S. Ct. at 2717-18.

Applying that deferential standard, we readily conclude that the Act easily passes constitutional muster. The legitimate legislative purpose is apparent. Congress obviously perceived problems in the industry, perceived a need to eliminate the old subsidy system, and decided to move to a free market system. However, Congress recognized that tobacco farmers and quota holders should be provided some cushion for the transition. Seeing these economic problems in the industry, Congress exercised its legitimate legislative powers to address same. We also readily conclude that the means Congress chose to address these industry problems were rational. Congress recognized that such a transition to a free market system would benefit all current and future tobacco manufacturers and importers, and thus devised a system of assessments to fund the transition to the free market system – i.e., assessing all current tobacco manufacturers and importers, all of whom would benefit from the transition to the free market system. Moreover, tobacco manufacturers and importers currently engaged in the domestic market are entities that are not only likely to benefit from the deregulation, but also are entities best suited to pass such increased costs along to the ultimate consumers.[11]

---

[11] Incidentally, the system advocated by Swisher might have placed a competitive burden upon the kind of tobacco that was previously subsidized by confining the assessments only to those sellers of tobacco products who previously purchased subsidized tobacco. By contrast, the system adopted by Congress places upon domestic tobacco producers no such adverse competitive burden. Rather, the statute spreads the burden of the assessments amongst all sellers of tobacco products in the domestic market (or more probably spreads such burden amongst all consumers of such tobacco products because the sellers will probably pass the burden through to the ultimate consumers).

We conclude that Congress exercised its powers to serve legitimate legislative purposes. We also conclude that Congress chose rational means. Thus, we conclude that Swisher has failed to show that the Act is arbitrary and irrational, and has failed to demonstrate that the Act is unconstitutional as applied to Swisher.[12]

---

[12] Although we decided above that a takings analysis would not be appropriate in this case, a close analysis of the rationale of Justice O'Connor's plurality opinion in *Eastern Enterprises* and Justice Kennedy's concurrence reveals that the rationale employed in the two opinions is strikingly similar. It is true that Justice O'Connor's rationale proceeded under the framework of the three factors of particular significance in regulatory takings: economic impact; interference with reasonable investment backed expectations; and the character of the governmental action. However, the factors she considered under that framework were virtually identical to the factors considered by Justice Kennedy under the due process framework. In both opinions, the crucial factor was the retroactivity of unprecedented scope. Both opinions focused on the fact that the new statutory obligations bore no relationship to Eastern's participation in the 1947 and 1950 agreements which predated the creation of any reasonable expectation on the part of employees of lifetime benefits. Indeed, Justice O'Connor acknowledges that the "analysis of legislation under the Takings and Due Process Clauses is correlated to some extent." *Eastern Enterprises*, 524 U.S. at 537, 118 S. Ct. at 2153 (plurality opinion). Similarly, Justice Kennedy notes: "[I]t is no accident that the primary retroactivity precedents upon which today's plurality opinion relies in its takings analysis were grounded in due process." *Id.* at 548, 118 S. Ct. at 2158 (Kennedy, J., concurring in the judgment and dissenting in part). Because the rationale underpinning the two analyses is so similar, we strongly suspect that we would reach the same result should we undertake the takings analysis described in Justice O'Connor's opinion for the plurality in *Eastern Enterprises*.

For example, Swisher complains vigorously that the imposition of the instant assessment on it is out of proportion to its experience with the prior subsidy programs. The flaw in Swisher's argument is that, unlike the situation in *Eastern Enterprises*, the assessments in the instant case are not based upon prior participation in the former subsidy programs. Quite the contrary, the assessments imposed by this Act are expressly based upon an entity's participation in the *current* domestic market for tobacco products. In other words, the assessments in the instant case are not retroactive at all.

C. Whether the Act Violates Swisher's Equal Protection Rights

Swisher also argues that the Act's methodology for allocating the assessments violates Swisher's equal protection rights.[13] This argument is without merit because the Act is economic legislation and Swisher is not a member of a suspect class. "[E]qual protection is not a license for the courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 2101 (1993). "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any *reasonably conceivable* state of facts that could provide a rational basis for the classification." *Id.* (emphasis added). The rational basis test demonstrates "the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one," and perfection is not required in making the necessary classifications. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314, 96 S. Ct. 2562, 2567 (1976).

Swisher contends that its equal protection rights are violated under Step A of the assessment determination because the maximum excise tax rate on cigars is used in determining the market share for the cigar industry, whereas the actual excise rate is used to determine the market share for cigarettes and other tobacco products. There is certainly a rational basis for choosing a unitary rate rather than the actual excise rate because "large cigars" are the only class of tobacco products that have a variable excise tax rate based on

---

[13] The Equal Protection Clause of the Fourteenth Amendment does not apply directly to the federal government; however, the principles of equal protection are applied to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 498-500, 74 S. Ct. 693, 694-95 (1954).

the price of the cigar. *See* 26 U.S.C. § 5701(a)(2). We readily conclude that it was not irrational for the Secretary to determine that it would be administratively convenient to choose one tax rate for calculating the market share for cigar manufacturers. Although the total share may not be perfectly equal, the methodology the Secretary uses meets the rational basis test.

Swisher also contends that its equal protection rights are violated under Step B because Swisher's intra-class share is determined by the number of cigars sold without any difference based on the cost or size of the cigar, and Swisher primarily produces less expensive, small cigars. Although the distribution of the intra-class share may not be perfect, choosing to allocate the assessment owed by each cigar manufacturer based on the number of cigars sold easily satisfies the highly deferential rational basis test. We readily conclude that it was not irrational for the Secretary to determine that basing this calculation on the volume of cigars sold would be administratively convenient.

Because there was a rational basis for the Act's methodology, we reject Swisher's equal protection challenge.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of the Secretary.

AFFIRMED.

COX, Circuit judge, specially concurring:
I concur in the judgment. I agree that the Act does not violate the Takings Clause. I also concur in sections III.B. and III.C. of the opinion, holding that Swisher's due process and equal protection rights are not violated by the obligations the Act imposes on Swisher.

[Pages 24a-32a left blank intentionally]

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SWISHER INTERNATIONAL, INC.,

Plaintiff, No. 3:05-cv-871-J16-TEM

v.

MIKE JOHANNS,
Secretary of Agriculture,

Defendant.

_____/

Before the Court are Defendant, Mike Johanns, the Secretary of the United States Department of Agriculture's Motion for Summary Judgment (the "Motion") (Dkt. 24), with incorporated Memorandum of Law and supporting affidavits. Plaintiff, Swisher International Incorporated ("Swisher") filed a Response and Cross Motion for Summary Judgment (the "Cross Motion") (Dkt. 34) with the parties' Stipulated Facts (Ex. 1) and supporting affidavits.[1] Also before the Court are Swisher's Reply (the "Reply") (Dkt. 35) and the

[1] Hereinafter Mike Johanns will be referred to as the "Secretary" and the Department of Agriculture shall be referred to as either the "Department" or "USDA."

Secretary's Reply to Response (the "Response") (Dkt. 37). The Court granted Swisher's Request for Oral Argument. (Dkt. 38). A transcript of that proceeding is on file with the Court. (Dkt. 43).[2]

I. Procedural Background

After exhausting its administrative remedies,[3] Swisher filed a four-count complaint (the "Complaint") (Dkt. 1) against the Secretary in his capacity as head of the Department on September 13, 2005.

II. Factual Background

Swisher, a Delaware corporation with principal operations located in Jacksonville, Florida, manufactures small and large cigars and some smokeless tobacco products. (Dkt. 34, Ex. 1, ¶ 2). Swisher alleges that regulations implementing the assessment provisions of the Fair and Equitable Tobacco Reform Act of 2004, 7 U.S.C. §§ 518 *et seq.* ("FETRA") are inconsistent with FETRA, in violation of the Administrative Procedure Act (the "APA"). Swisher further alleges that FETRA and its implementing regulations violate the Takings and

---

[2] References to that transcript will be designated as Dkt. 43 at p.__.

[3] On June 23, 2005, pursuant to Department regulations, Swisher paid its assessments under the Fair and Equitable Tobacco Reform Act of 2004, which were levied for the first two quarters of fiscal year 2005. Swisher also filed objections regarding the impropriety of the assessments. On July 12, 2005, the Department sent Swisher a letter rejecting Swisher's objections. The letter informed Swisher that the administrative appeals process could not be used to "challenge statutory or regulatory provisions or any mathematical formula or other procedure or policy that is generally applicable to all similarly situated participants." (Dkt. 1, ¶ 89).

Due Process Clauses of the Fifth Amendment and principles of Equal Protection.

FETRA comprises part of the American Jobs Creation Act of 2004, which was signed into law by the President on October 22, 2004.[4] *Pub. L.* 108-357. FETRA repealed the tobacco marketing quota and related price support programs authorized by Title III of the Agricultural Adjustment Act of 1938 and the Agricultural Act of 1949, transforming tobacco production into a free market system at the end of the 2004 crop year.[5]

In order to assist with the transition from the highly regulated market to the free market, FETRA provides for a "buyout" of tobacco farmers and tobacco quota holders (the "producers") based on their historic quota levels. The buyout, titled the Tobacco Transition Payment Program ("TTPP"), is annualized and paid over ten (10) years. It is projected to cost $9.6 billion and is funded through quarterly assessments on tobacco product manufacturers and importers (the "manufacturers") imposed by the Secretary through the Department's Commodity Credit Corporation ("CCC"). The CCC deposits the quarterly assessments made under the TTPP into a revolving trust fund, the Tobacco Trust Fund (the "TTF"), which Congress created specifically to carry out the Act's purposes. 7 U.S.C. § 518(e)(a).[6]

---

[4] Sections 611-613 of the American Jobs Creation Act of 2004, codified at 7 U.S.C. § 518 (West 2005).

[5] Under the now repealed tobacco quota program, the price and supply of tobacco grown and sold in the United States was regulated.

[6] The CCC's authority to make assessments under FETRA "terminates on September 30, 2014," 7 U.S.C. § 518(d)(k), and FETRA limits the trust fund expenditures to $10,140,000,000. 7 U.S.C. § 518(f).

Under FETRA there is a two-step process to determine a manufacturer's quarterly assessment. First, the overall amount needed to make transition payments to producers is allocated among the six classes of tobacco set out in FETRA, i.e., cigarettes, cigars, snuff, roll-your-own, chewing and pipe ("Step A"). 7 U.S.C. § 518(c)(1). Second, within each class, the amount required to be paid by each manufacturer is allocated on a *pro rata* basis based upon each manufacturer's share of gross domestic volume as calculated under the statute ("Step B"). 7 U.S.C. § 518(e).

By statute, the assessments began in fiscal year ("FY") 2005 and conclude in FY 2014. 7 U.S.C. § 518d(b)(1). For FY 2005, FETRA established the Step A allocation. 7 U.S.C. § 518(c)(1). For the ensuing FYs, the Secretary is directed to "periodically adjust the percentage . . . to be assessed against . . . the [manufacturers] of each class of tobacco product . . . to reflect changes in the share of gross domestic product volume held by that class of tobacco product." 7 U.S.C. § 518d(c)(2). For Step B determinations, the shares payable by the cigar and cigarette classes are based on the gross domestic volume as measured by the number of cigarettes and cigars "removed from bond" and placed in domestic commerce. 7 U.S.C. § 518d(e)(1). To determine the final assessment for each manufacturer within a certain class its Step B figure is multiplied by the assessment amount assigned to the relevant class under the Step A process. 7 U.S.C. § 518d(f). *See also* the Johnson. Decl., Dkt. 24, Ex.1, ¶ 11.

Pursuant to FETRA, the CCC issued regulations governing the process for assessing manufacturers. *See* 7 C.F.R. §§ 1463.1 *et seq*. Those regulations, titled the

Tobacco Transition Program, are codified at 7 C.F.R. §§ 1463.1-1463.201.[7]

Under the implementing regulations, CCC makes an annual determination of the national assessment, which is then "split up" on a class wide basis (Step A) based on the CCC's determination of each class's share of total excise taxes paid on tobacco products under 26 U.S.C. § 5701 in a manner that complies with FETRA. 7 C.F.R. §§ 1463.4, 1463.5. For large cigars, the excise tax rate varies, subject to a statutory cap. To determine relative market share, the Department uses the maximum excise tax rate assigned. For all other tobacco types, the Department determines each tobacco class's relative market share using actual excise tax rates. Following that, each class's assessment is further divided among the individual manufacturers (Step B) based on domestic market share as determined under FETRA, and the total assessments are calculated. 7 C.F.R. §§ 1463.7.

Each entity's Step B percentage of the class's portion of the assessment is calculated using the relevant volume for the manufacturer. Excise taxes for products other than cigars and cigarettes are calculated based on weight. For cigars and cigarettes, FETRA requires the CCC to rely on the number of units removed to determine each company's Step B share of the class assessment. Therefore, volumes for cigarettes and cigars are reported on a "per stick" rather than a weight basis.

In summary, under FETRA regulations, each manufacturer is assessed an amount based on (1) the total amount of money needed that quarter to fund the TTPP; (2) the percentage of the total assigned to that company's

---

[7] FETRA required that the regulations be promulgated without regard to the notice and comment provisions of 5 U.S.C. § 553. 7 U.S.C. § 642(b).

class of tobacco products, and (3) that company's share of the total volume of domestic sales for that class based on volume, as measured either on a pound or stick basis. As of the filing of the Motion, Swisher has paid over $11 million dollars in FY 2005 in FETRA assessments. Admin. Rec. at 676.[8]

III. Applicable Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact [such] that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987); *Edwards v. Acadia Realty Trust*, Inc., 141 F. Supp. 2d 1340, 1344-45 (M.D. Fla. 2001). The Court will construe the record and all inferences that can be drawn from it in the light most favorable to the nonmoving party, and the moving party bears the initial burden of establishing the absence of a genuine material fact. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Samples on Behalf of Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). Once this burden is met, however, the opposing party must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing there is a genuine issue for trial.'" *Celotex Corp.*, 477

[8] Swisher claims that over the ten-year period of FETRA, Swisher is likely to have to pay in excess of $100 million dollars. (Dkt. 34 at p. 7). Although, as will be demonstrated below, this figure is not statutorily "set in stone."

U.S. at 342. The Eleventh Circuit explained in *Samples* that the opposing party need only present evidence from which a jury might return a verdict in its favor in order to survive the moving party's motion for summary judgment. *See Samples*, 846 F.2d at 1330; *see also Augusta Iron & Steel Works v. Employers Insurance of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988).

Notably, the Supreme Court pointed out in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), that the moving party's burden only extends to facts that might affect the outcome of the lawsuit under the governing law, as "[f]actual disputes that are irrelevant or unnecessary will not be counted." Summary judgment will only be granted if all facts and inferences point overwhelmingly in favor of the moving party, such that a responsible jury could not find in favor of the opposing party. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). If there is conflicting evidence that will permit differing reasonable inferences, the case will be submitted to the jury. *See Augusta Iron & Steel*, 835 F.2d at 856.

When considering cross-motions for summary judgment, the court evaluates each motion under the same standard. *Cubic Def. Sys. Inc. v. United States*, 45 Fed. Cl. 450, 457 (1999). If genuine disputes exist over material facts, both motions must be denied. *Mingus Contractors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

IV. Parties' Arguments and Analysis

Arguments

Swisher raises four objections to the FETRA assessments.

A. Takings

Swisher alleges that FETRA violates the Takings Clause by requiring Swisher to make payments to the TTF. (Dkt. 1, ¶¶ 93-94). Specifically, Swisher claims that FETRA effects a direct transfer of money from manufacturers to private individuals, in this case, producers (Dkt. 1, ¶ 52). The Secretary claims that what Swisher describes as a taking is "nothing more than a tax." (Dkt. 24 at p. 8). The Secretary claims that FETRA was passed as part of a tax bill, the American Jobs Creation Act of 2004, 26 U.S.C. §§ 199 et seq., and that FETRA simply creates an obligation for manufacturers to pay money to the government. The Secretary further claims that the Takings Clause can be applied to the payment of money to the government only where "a specific fund of money is at issue . . . ." (Dkt. 24 at p. 9). The Secretary claims that in the "absence of such specific, articulable, funds of money, there can be no Takings Clause claim based on an obligation to pay or be paid money." (Dkt. 24 at p. 9).

In support of this contention, the Secretary claims that "several federal courts have recognized that in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a majority of the Supreme Court held that the obligation to pay money cannot be considered a taking under the

Takings Clause. (Dkt. 24 at p. 9). The Secretary characterizes the *Eastern Enterprises* case as follows:

> In *Eastern Enterprises*, a four-justice plurality decided that the Coal Act unconstitutionally required a former operator of a coal mine to fund health benefits for retired miners who were former employers . . . . But, *Eastern Enterprises* was decided by a fractured court. Justice Kennedy, in his concurrence, disagreed with the plurality's conclusion that the Coal Act constituted a taking . . . . Rather, he would have decided the case on due process grounds . . . . The four dissenters rejected the notion that a Takings Clause analysis applied because the case involved "not an interest in physical or intellectual property, but an ordinary liability to pay money. . . ." Thus, five justices agreed that regulatory actions requiring the payment of moneys are not takings. . . .

(Dkt. 24, pp. 9-10 (internal citations to *Eastern Enterprises* omitted)).

Swisher responds that "in an effort to duck the Takings Clause analysis altogether, [the Secretary] asserts that Takings Clause scrutiny is inapplicable here because FETRA is 'nothing more than a tax.'" (Dkt. 34 at p.15). Citing *Eastern Enterprises* for support, Swisher engages in a takings analysis using the three-part test set forth in *Connolly v. Pension Benefit Guar. Co.*, 475 U.S. 211 (1986), which is fully articulated below. Swisher further argues that the Supreme Court has "repeatedly held that an obligation to pay money can be struck down under the Takings Clause." (Dkt. 34 at 19, citing to *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) and *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980)). Lastly, Swisher claims that the

Secretary's attempt to distinguish *Phillips* and *Webb's* on the basis that in those cases a "specific fund of money [wa]s at issue" is "nonsensical." (Dkt. 34 at p. 19, citing to Dkt. 24 at p. 9).

In the Reply, the Secretary first claims that the FETRA assessment constitutes a tax under the three-factor tax vs. regulatory fee test set out in *San Juan Cellular Telephone Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992).[9] The Secretary further claims that even if the FETRA assessments were not taxes, the Secretary would still prevail on Swisher's constitutional claims because the Takings Clause does not apply to the payment of money to the government unless a specific fund of money is at issue.

In the Response, Swisher argues that the three-factor test employed in *San Juan Cellular*, in fact, confirms "unmistakably that the FETRA assessments are regulatory fees and not 'taxes.'" (Dkt. 37 at p. 4). Swisher reiterates in the Response that under the regulatory takings analysis FETRA's assessments are unconstitutional Finally, Swisher also claims in the Response that the takings analysis is applicable because in this case, there is a particular fund of money at issue, which is the "very specific amount of money that the USDA has assessed and collected from Swisher under FETRA . . . ." (Dkt. 37 at p. 10).

---

[9] In *San Juan Cellular* the court set out a three-factor test to determine whether a case involves a tax or regulatory fee under the Tax Injunction Act, 28 U.S.C. § 1341, which precludes federal courts from enjoining collection of any tax under state law. The three factors are whether the payment is: (1) imposed by an agency or the legislature; (2) imposed upon those being regulated or the community as a whole; and, (3) for the purpose of defraying regulatory costs or to raise revenue.

B. Due Process

Swisher claims that by enforcing FETRA, the Secretary has deprived Swisher of property without due process of law. (Dkt. 1, ¶¶ 98-100). In support Swisher claims that FETRA unfairly imposes assessments on it, and all manufacturers, without regard to those companies' involvement or non-involvement in the old quota system. Swisher claims that during the last ten years it purchased over 99% of its tobacco outside of the United States (Dkt. 1, ¶ 5) and only purchased minute quantities of quota tobacco. (Dkt. 1, ¶ 23).[10]

In the Motion, the Department claims entitlement to summary judgment on Swisher's Due Process claims because a Congressional Act does not violate the Due Process Clause if it is rationally related to a legitimate public purpose and, in this case, the assessments levied under FETRA are rationally related to a legitimate public purpose. The Secretary claims that among other reasons, "Congress could have concluded that it was good, discretionary public policy to help farmers transition from the old tobacco quota and price support systems and prepare to operate for the first time in an environment where prices are market-based. (Dkt. 24, pp. 11-12, citing to 7 U.S.C. §§ 518 *et seq.*; 150 Cong. Rec. H8704-03, *H8718 19 (Oct. 7, 2004); 150 Cong. Rec. H5581-04, *H5591-92 (July 13, 2004)).

In addition, the Secretary further claims that in "the exercise of its power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others." (Dkt. 24, citing to *Sonzinsky v. United States*,

---

[10] See Stipulated Facts ¶¶16-18 for the specifics and percentages of Swisher's quota tobacco purchased in FY 2002 through 2004.

300 U.S. 506, 512 (1937)). Finally, the Secretary claims that Swisher may benefit from FETRA because in the absence of price supports under the old quota system, prices for domestic tobacco are expected to decline, which may in turn cause prices for foreign tobacco to decline. This price decline could provide a benefit to companies purchasing domestic and foreign tobacco. (Dkt. 24 at p.14).

In its Cross Motion, Swisher does not directly address the arguments raised by the Secretary; rather, Swisher takes issue with the Secretary's interpretation of the *Eastern Enterprises* case. Specifically, Swisher claims that Justice Kennedy provided the plurality with the fifth vote required to strike down the Coal Act as unconstitutional when he found that "the Due Process Clause was violated because the Act unfairly imposed retroactive liability on a private company that had not participated in the conduct that harmed the mine worker retirees, and that could not have anticipated being subject to health care liability after the fact." (Dkt. 34 at p. 25, citing to *Eastern Enterprises*, 524 U.S. at 547-50).

In the Reply, the Secretary claims that Swisher's due process argument is completely lacking in legal basis because 1) in *Eastern Enterprises* only Justice Kennedy referenced the Due Process clause and 2) FETRA is "not retroactive in nature, but rather it is simply a condition [of] doing business." (Dkt. 35 at p. 13). Finally, the Secretary claims that because the Cross Motion failed to address the due process arguments raised by the Secretary, those arguments are now conceded and the Secretary is entitled to summary judgment on this issue. In its Response, Swisher argues that it has not conceded its due process claims. Rather, Swisher contends that

these claims are still viable and not simply preserved but "compelling." (Dkt. 37 at p.16).

C. Equal Protection[11]

Swisher claims that the Secretary violated the Equal Protection Clause[12] by subjecting Swisher to "adverse and differential treatment based on completely irrational rules and regulations which in no way are calculated to further the ends of FETRA." (Dkt. 1, ¶ 103). Specifically, Swisher alleges that FETRA discriminates against it in three ways: (1) the maximum excise tax rate is used for calculating the cigar class share at Step A; (2) at Step B, list price is used to allocate shares among cigar manufacturers, while for other tobacco products the class share is allocated based on units (this, Swisher alleges prevents it from passing the cost on to consumers); and, (3) small and large cigars are treated as like products for the purpose of allocating FETRA liability.

The Secretary responds that Swisher's arguments fail because:

> [T]he only statutorily fixed excise tax rate is used for all tobacco products, not solely for large cigars. Contrary to [Swisher's] misreading of [FETRA], list price is not used in allocating the

---

[11] The parties spent considerable time briefing this issue and provided the Court with detailed support for their positions. During oral argument, however, the parties distilled their positions and honed their arguments. Because the oral arguments represent the essence of the parties' differences, the Court will refer to them when addressing this constitutional claim.

[12] The Equal Protection Clause of the Fourteenth Amendment does not apply to the federal government, but by its terms, applies only to the States. *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). However, principles of equal protection are applied to the federal government as a component of the Fifth Amendment's Due Process Clause. *Id.* at 499-500.

> cigar class's payments. Further, to the extent that [FETRA] treats cigars differently than other forms of tobacco at Steps A and B, such distinctions are supported by rational bases. Finally, Congress's decision to group large and small cigars into a single class is not irrational.

(Dkt. 24 at p.15).

D. APA Violations

Finally, Swisher claims that the regulations promulgated under FETRA violate the APA because the FETRA assessments imposed on Swisher are "grossly excessive" and not "supported by the preponderance of the information available to the Secretary." (Dkt. 1, ¶ 107). The Secretary moved for summary judgment on these issues claiming that the standard of review under the APA is extremely deferential and that Swisher's arguments under the APA are essentially the same as its due process and equal protection arguments.

Swisher failed to address any of the APA arguments raised by the Secretary. The Secretary claims now that this failure means that Swisher has conceded its APA arguments. The Court agrees. Thus, these claims are no longer before the Court.

V. Analysis

The threshold issue in this case is whether FETRA is a tax or an assessment. A tax is usually "imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community." *San Juan Cellular Telephone Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685

(1st Cir. 1992). "A 'regulatory fee' is imposed by an agency upon those subject to its regulation." *Id.* A regulatory fee may serve its purpose directly (by deliberately discouraging behavior by making it more expensive) or indirectly (by raising money placed in a special fund to help defray an agency's regulation related expenses). *Id.*

The Secretary claims that the "FETRA assessment is a tax on Swisher's current production of cigars, no different in the final analysis, than the excise taxes its pays pursuant to the Internal Revenue Code on the cigars it manufactures." (Dkt. 35 at p. 6). The Secretary claims that the FETRA fee is simply a revenue measure that has an impact on all members engaged in a certain activity. (Dkt. 35 at p. 4). Stated differently, the Secretary claims that FETRA creates an "obligation for ongoing manufacturers and importers of tobacco products to pay money to the government in connection with future, not past marketings - that is, the assessments are a condition of doing business in tobacco . . . ." (Dkt. 35 at p. 2). Swisher, of course, claims that the FETRA fees are not a tax and the Secretary is attempting in vain to fit its argument into "the framework courts have developed for distinguishing between 'assessments' and 'taxes' for purposes of the Tax Injunction Act," 28 U.S.C. § 1341 ("TIA"). (Dkt. 37 at p. 4).

Swisher is referring to *San Juan Cellular*, which remains the leading case on this issue. The *San Juan Cellular* court set out a three-factor test to determine whether a case involves a "tax" or "regulatory fee" under the TIA, which precludes federal courts from enjoining collection of any tax under state law. The three factors are whether the payment is: (1) imposed by an agency or the legislature; (2) imposed upon those being regulated

or the community as a whole; and, (3) for the purpose of defraying regulatory costs or to raise revenue.

The problem here is three-fold. First, the FETRA fee does not conform neatly to the "classic" definitions of "tax" and "regulatory fee." Second, *San Juan Cellular* is the formula used for classifying "exactions under the [TIA] - asking whether the payment is a tax to raise general revenue or is a fee incident to regulation." *Trailer Marine Transport Corp. v. Rivera*, 977 F.2d 1 (1st Cir. 1992). The TIA is not implicated here. Third, as will be seen, the three *San Juan Cellular* factors are not particularly useful in this case.

The first *San Juan Cellular* factor suggests the FETRA fee is a tax because it is imposed by Congress. The second *San Juan Cellular* factor suggests that the FETRA fee is an assessment because it is imposed only on a narrow class of persons – tobacco manufacturers. In close cases such as this, courts have emphasized the importance of the third factor from *San Juan Cellular* - the ultimate use of the fees.[13] *See id.* at 685; *see also Hager v. City of West Peoria*, 84 F.3d 865, 870-71 (7th Cir. 1996) ("Rather than a question solely of *where* the

---

[13] Plaintiff informs the Court that the word "tax" is never used in FETRA, only the word "assessment." However, this fact is not of critical import. The label given by a state for an assessment or charge is not dispositive. *Marcus v. Kansas Dep't. of Revenue*, 170 F.3d 1305, 1311 (10th Cir. 1999)(citing to *Wright v. McClain*, 835 F.2d 135, 144 (6th Cir. 1987) and *Cumberland Farms, Inc. v. Tax Assessor*, 116 F.3d 943, 946 (1st Cir. 1997) for the same proposition). The Secretary's argument that FETRA was passed as part of a tax bill, the American Jobs Creation Act of 2004, 26 U.S.C. §§ 199 *et seq.*, is also not of critical import. Further complicating the Court's analysis applying the third *San Juan Cellular* factor is the fact that previous court decisions have "applied the label 'tax' . . . to a range of exactions that might not be commonly described as taxes . . . ." *Trailer Marine Transport*, 977 F.2d at 5 (collecting cases exemplifying this application).

money goes, the issue is *why* the money is taken."). The FETRA fee is neither exclusively paid to defray regulatory costs nor to raise revenue. The FETRA fee raises money to "enable tobacco farmers to transition into the free market." (Dkt. 35 at p. 4). Essentially, the FETRA fee provides funds to help dismantle a regulatory system, that is, the former federal price support system. Although the hybrid FETRA fee appears to this Court to provide the Federal Government with a financial framework that allows it to avoid directly paying for this free market transition. It is clear that the FETRA fee is more about deregulation than revenue. Certainly payments for the cost of a regulatory system would fall in the regulation category. So then should the cost for dismantling it. Swisher itself wrote and the Court agrees that, "the whole point of FETRA is that the [Department] will continue to regulate tobacco growing for the next decade . . . by way of calculating, allocating and collecting $10 billion in assessments from manufacturers . . . ." (Dkt. 37 at p. 9).

The Court finds that FETRA is primarily concerned with regulation - albeit through the seemingly incongruous aim of aiding in the transition of formerly heavily regulated industry to a free market system. If regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax. *See State of S.C. ex. Rel Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983) (citing to *United States v. Strangland*, 242 F.2d 843, 848 (7th Cir. 1957) and *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943)). Having made this initial determination that the FETRA fee is an assessment and not a tax, the Court addresses the parties' substantive constitutional arguments.

A. Takings

Often called the Just Compensation Clause, the final Clause of the Fifth Amendment reads that "private property shall not be taken for public use without just compensation. U.S. Const. amend. V. While it confirms the government's authority to confiscate private property, the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for "public use" and "just compensation" must be paid. The aim of the Clause is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

"Classic" takings cases involve situations in which the government directly appropriates private property for its own use. *See e.g., United States v. Security Industrial Bank,* 459 U.S. 70, 78 (1982). A taking may occur as a result of a regulatory action that is neither a physical invasion nor a physical restraint. As stated by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal*, 260 U.S. at 415. However not all regulatory actions will constitute a regulatory taking. *Id.* at 415. The large body of Supreme Court cases addressing "physical" takings, for the most part, involves the straightforward application of *per se* rules.

In contrast, the Supreme Court's "regulatory" takings analysis "is characterized by 'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all of the relevant circumstances.'" *Brown v.*

Legal Foundation of Washington, 538 U.S. 216, 233 (2003) (internal citations omitted). That *ad hoc,* factual inquiry is conducted using three factors of "particular significance" as set forth in *Connolly v. Pension Benefit Guar. Co.*, 475 U.S. at 225 (1986) (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978)), that is: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with the claimant's investment backed expectations, and (3) the nature of the governmental action." *See also Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

The fact-intensive nature of takings claims has caused some courts to find summary judgment to be inappropriate; however, where a court finds, as the Court does here, that the material facts have been adequately developed on the record and no genuine issues of material fact exist, summary judgment is appropriate. *See Chang v. United States*, 859 F.2d 893, 898 (Fed. Cir. 1988) (holding that even though a regulatory taking analysis is normally *ad hoc* and fact-intensive, the United States may still be entitled to summary judgment as a matter of law).

A proper takings analysis begins by identifying the property interest at stake. Swisher claims that the property at stake is "a specific sum of money that it once had but that the USDA took from it." (Dkt. 37 at p. 11). The Secretary claims that "[t]here is no property interest at stake in an ordinary obligation to pay money." (Dkt. 35 at p. 7). Both parties rely on the Supreme Court's decision in *Eastern Enterprises*, to support their positions. Swisher cites to the plurality's takings analysis in *Eastern Enterprises* to support its position. The Secretary claims that the precedential import of "*Eastern*

Enterprises with respect to the Taking's Clause is that the Taking's Clause does not apply to the government taking money." (Dkt. 35 at p. 7). The Court agrees with the Secretary's position based on the well-reasoned opinion in *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29 (Fed. Cl. 2000)(*Commonwealth Edison I*), *aff'd*, 271 F.3d 1327 (Fed. Cir. 2001), which found that "discerning a controlling rule of law from the welter of conflicting opinions in *Eastern* requires careful reflection . . . in cases where approaches fundamentally differ, no particular standard is binding on an inferior court because none has received the support of a majority of the Supreme Court." *Commonwealth Edison I*, 46 Fed. Cl. at 39. The *Commonwealth Edison I* court further noted that "numerous courts have recently agreed with this conclusion, observing that *Eastern* essentially leaves takings law unaffected." *Id.* at 40 (listing cases in agreement). As its final step, the *Commonwealth Edison I* court conducted a thorough review of cases (which this Court will not reproduce here) and distinguished *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980).[14] After this review, the *Commonwealth Edison I*

---

[14] Swisher argues that "if the money is a concrete obligation and not an abstract obligation . . . if it's definitive, non-speculative and concrete, and it's money that's property, and that's subject to takings analysis." (Dkt. 43, pp. 15-16). Swisher relies on the court's holding in *Webb*. In *Webb* the court found that a state statute pursuant to which a county could take the interest accruing on an interpleader fund deposited in the registry of the county court was unconstitutional in violation of the Takings Clause of the Fifth and Fourteenth Amendments. Swisher's reliance on *Webb* is misplaced. FETRA's assessment is still more akin to the imposition of a financial burden than it is to the specific interest accruing on a specific fund like the one at issue in *Webb*. In addition, the Court notes that although the financial hardship imposed by FETRA is inescapable, Swisher's yearly assessment is variable. In addition, although FETRA provides a definitive cap of $10.14 billion (with $9.6 billion in expected

court concluded that "[t]aken together, these cases lead this court to conclude that a government-imposed payment of money cannot result in a compensable taking." *Id.* at 41. This Court agrees.

In a footnote, the *Commonwealth Edison* I court also found that were it obliged to apply a takings analysis, using the three factors set out in *Connolly*, to the special assessment, "it would, nonetheless, conclude that there has been no taking here." *Id.* at 42, n.17. This Court reaches the same conclusion with the facts before it. The three *Connolly* factors are: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with the claimant's investment backed expectations, and (3) the nature of the governmental action.

FETRA may have a $100 million dollar impact on Swisher over the ten-year period that it covers. Swisher paid over $11 million in FETRA fees during the first calendar year FETRA was enacted. Swisher claims that these assessments constitute a "considerable financial burden." (Dkt. 34 at p.11). Swisher claims that FETRA forces tobacco manufacturers to finance "a nearly $10 billion payoff to growers that was entirely unanticipated, was never agreed to by manufacturers, and that is particularly unjust given the seventy years of government largess that the price support system has already provided to growers at manufacturer's expense." (Dkt. 34 at p. 11, citing to the Fraleigh Decl. ¶¶ 4-7). Swisher further claims that it had only a "glancing" interaction

---

payments to quota holders and producers and $540 million to cover anticipated losses and eligible expenses), the Secretary has as of September 2006, entered into contracts with producers approximating only $2.9 billion. *See Neese v. Johanns*, 450 F.Supp.2d 632 (W.D. Va. 2006).

with the former price support system because that system dealt mainly with cigarette-type tobacco. Swisher further claims that its purchases of other kinds of tobacco represent less than one-twentieth of one percent of the tobacco subject to the program . . ." (Dkt. 34 at p. 12, citing to the Fraleigh Decl. ¶¶ 4-7; Stipulated Facts ¶¶ 13-20). Swisher claims that its responsibility under FETRA is retroactively imposed and "untethered" to its past conduct and responsibility. Turning to the third *Connelly* prong - the nature and character of the government program – Swisher characterizes FETRA as a "pay-off" or "wealth transfer" from manufacturers to growers. Swisher further claims that FETRA serves no general public purpose.

In response, the Secretary argues that although "$10 million a year sounds like a lot of money, the fact remains that while we're talking about the FETRA, the effect of the FETRA on Swisher it is less than one-tenth of a cent of tax on each cigar, which means that we're talking about less than a dollar on every thousand cigars. The current maximum excise tax is $48.75 per thousand cigars. [Swisher is] contending that the difference between $48.75 and $49.75 is some sort of extreme burden on them." (Dkt. 43 at p. 31).

With respect to Swisher's expectations, the Secretary also claims, that the manufacture of tobacco is a "heavily taxed industry, so it should certainly come as no shock to any company that is in the business of producing cigars, cigarettes or other tobacco products, that there is a government tax."[15] Swisher's counter arguments are

[15] The Court has already determined that the FETRA fee is an assessment and not a tax; however, the basic principle is the same - an entity engaged in the manufacture of tobacco should not be surprised by a Government assessment.

compelling. Swisher did participate in the previous tobacco marketing quota and related price support programs and tobacco manufacturing is heavily regulated. Swisher has called the Court's attention on multiple occasions to the provisions of the Master Settlement Agreement (the "MSA").[16] Even though Swisher was not a signatory to the MSA, it was aware of its provisions and the potential impact that it might have.

Congress has made clear that FETRA serves the public purpose of aiding farmers in the difficult and potentially financially ruinous transition to the free market. At the Secretary contends the nature and character of the program "is not to impose a liability on a wrong, rather it is to generate revenue to pay for a program. FETRA accomplishes that goal by assessing all of the companies in the industry that purchased tobacco in the past and uses the funds raised to pay to help the tobacco growers and producers transition into a free market economy." (Dkt. 43 at p. 32). The Secretary adds that this act of aiding growers in the transition to the free market, to ensure that they do not fail, provides a benefit to the public. Swisher's attempts to prove that FETRA's fees constitute a taking are as tortured as the Secretary's attempts to avoid having FETRA's fees characterized as

---

[16] The MSA is a settlement agreement between four cigarette manufacturers and the attorney generals of forty-six states, the District of Columbia, the Commonwealth of Puerto Rico, and four other American territories. The MSA requires the cigarette manufacturers to make payments to the signatory states and other entities and establishes a trust fund to compensate tobacco farmers for losses that may result from an increase in cigarette prices or a decrease in consumption. (Dkt. 1, ¶ 26). Swisher alleges that participation in the TTPP constitutes an offset under the MSA for the four cigarette manufacturers. (Dkt 1, ¶ 29). See *State of North Carolina v. Phillip Morris USA Inc.*, 618 S.E.2d 219 (N.C. Sup. Ct. 2005), for an in-depth review of the politics underpinning the MSA and its relation to FETRA.

assessments. As the Court stated previously, in-depth analysis on this issue is unnecessary. To paraphrase the court in *Buffalo Teachers Federation v. Tobe*, 464 F.3d 362 (2d Cir. 2006), sometimes the net effect of a regulation may "well be to take from Peter to pay Paul, but such burden shifting does not, without more, amount to a regulatory taking." *Buffalo Teachers Federation*, 464 F.3d at p. 376 (citing to *Connolly*, 475 US at 223, for the proposition that "[g]iven the proprietary of the governmental power to regulate, it cannot be said that the Takings Clause is violated whenever the litigation required one person to use his or her assets for the benefit of another."). In conclusion then, there is no Takings Clause claim in this case and summary judgment for the Secretary is appropriate.

B. Due Process

The standard of review for a due process challenge is well-settled. The Supreme Court stated in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976), "[i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."

In *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001), the court noted that "[w]here the basis for the challenge is retroactivity, the Supreme Court has held that due process is satisfied 'simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.'" *Id.* at 1341 (internal citations omitted). As to the law vs. fact

aspect of this issue, the *Commonwealth Edison* court further noted that:

> In judging the rationality of legislation under the Due Process Clause, an evidentiary trial of facts, . . . is not required. Rather, . . . [T]he question is whether the legislative conclusion [to enact the statute] was reasonable and supported by the substantial evidence in the record before Congress. In making that determination, we are not to re-weigh the evidence *de novo*, or to replace Congress' factual predictions with our own. Rather, we are simply to determine if the standard [of review] is satisfied. If it is, summary judgment . . . is appropriate regardless of whether the evidence is in conflict.

Commonwealth Edison, 271 F.3d at 1341-42 (internal citations omitted).

After conducting an exhaustive review of Supreme Court due process case history, the *Commonwealth Edison* court, citing to Justice Kennedy in *Eastern Enterprises*, stated that "'[s]tatutes may be invalidated on due process grounds only under the most egregious of circumstances. *Commonwealth Edison*, 271 F.3d at 1345 (quoting from *Eastern Enterprises*, 524 U.S. at 550).[17] The *Commonwealth Edison* court then identified two factors, which if met, would render "even severe retroactive obligations . . . rational and . . . constitutional under the Due Process clause." *Id.* at 1346. These factors are if "(1) Congress reasonably concluded that the party

---

[17] The *Commonwealth Edison* court further noted that "[a]lthough such 'most egregious circumstances' do not exist *unless* the legislation is severely retroactive, they do not exist *merely* because the legislation is severely retroactive and costly." *Commonwealth Edison*, 271 F.3d at 1345-46.

subjected to retroactive obligations benefitted from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party; and (2) the imposition of retroactive liability would not be contrary to that party's reasonable expectations." *Id.* (noting that legislation may be constitutional if either of the two conditions is satisfied, but that the court need not reach that decision in that case because both conditions were present).

The *Commonwealth Edison* court succinctly concluded that "[i]n short, legislative facts control the analysis. In these Due Process cases the federal courts are not assigned the task of making policy, determining a fair outcome, or determining the actual state of facts. We are charged simply with determining whether the congressional action was rational." *Id.* at 1342.

Swisher's due process arguments suffer from three fatal flaws - first, Swisher's due process analysis relies on *Eastern Enterprises*; second, Swisher has not demonstrated that FETRA is either arbitrary or irrational; and, even assuming that FETRA is retroactive, it would still be rational under the two-factor test enumerated in *Commonwealth Edison*.

The Secretary rightly notes that Swisher's due process arguments are scant. Instead of providing substantive arguments on the issue, Swisher piggybacks its due process arguments with its takings analysis under the three factors set out in *Connolly*. Swisher places too much reliance on *Eastern Enterprises*. As the court in *Commonwealth Edison* noted, "[t]he District of Columbia Circuit has concluded that the plurality and concurrence in *Eastern Enterprises* cannot be combined into a single holding on the Due Process issue." *Id.* at 1344, n.14 (citing to *Ass'n of Bituminous Contractors v.*

Apfel, 156 F.3d 1246, 1254- 55 (D.C. Cir. 1998), which found that "Justice Kennedy's concurrence in the judgment is of no help in appellant's efforts to cobble together a due process holding from *Eastern Enterprises* fragmented parts . . . . [Justice Kennedy] alone was willing to invalidate economic legislation on the ground that it violated the Due Process Clause. And, as should be obvious, Justice Kennedy's due process reasoning can in no sense be thought a logical subset of the plurality's takings analysis.").[18]

Congress enacted FETRA to help farmers transition from the old tobacco quota and price support systems to a market based system. Congress thought this was necessary to aid the largely aging quota holders who relied on quota leases to maintain income and to stem the economic ripple effect facing large tobacco-producing states, like North Carolina and Kentucky, from the MSA's decreasing the demand for domestically produced tobacco. *See* Matthew Nis Leerberg, *Takings and Statutory Entitlement: Does the Tobacco Buyout Take Quota Rights Without Just Compensation?*, 55 DUKE L.J. 865, 871 (2006). This clearly is a legitimate purpose for enacting FETRA. However, even if this were not a legitimate purpose, "the challenged legislation . . . is to be upheld if there is any conceivable rational basis supporting it, whether or not the Congress had that particular basis in mind when the legislation was enacted. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

---

[18] The *Bituminous* court also stated that, "although the plurality noted that 'analysis of legislation under the Takings and Due Process Clauses is correlated to some extent . . . a correlation is not an equivalency." *Bituminous*, 156 F.3d at 1254.

The means employed by Congress to facilitate the goals of FETRA cannot be called "irrational." Congress tapped tobacco manufacturers who had purchased tobacco under the old support system to bear some of the costs associated with dismantling that system. Swisher does not dispute that it purchased tobacco under the old system, rather it claims that its purchases were minimal. Past participation is a rational basis for requiring Swisher to participate in FETRA.

Swisher continually claims that FETRA is retroactive. The Secretary claims that Swisher is not retroactive, rather it is simply "a condition of doing business." (Dkt. 35 at p. 13). The Court need not make a final determination, because even giving Swisher the benefit of the doubt about FETRA's retroactivity, Swisher's due process arguments fail under the two-factor test enumerated in *Commonwealth Edison.*

Congress reasonably concluded that the party subjected to retroactive obligations benefitted from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party. Swisher claims, and the Court does not disagree entirely, that Swisher does not appear to have directly benefitted from its participation in the old quota system. However, some of the purposes of the old quota system could be viewed as beneficial to Swisher. The quota system was designed in part to combat the lack of "orderly marketing" of tobacco by ensuring that tobacco manufacturers would have an ample but not excessive supply of acceptable tobacco. *See* Nis Leerberg, 55 *DUKE L.J.* at 868 (2006). In addition, Swisher purchased foreign grown tobacco, which is far cheaper than domestically grown tobacco. Foreign grown tobacco was so much cheaper than domestically grown tobacco, in

part, because of the old quota system and price supports. It cannot be denied that Swisher, as it has acknowledged, benefitted from the ability to purchase cheap foreign tobacco. The Court has already noted that although $10 million a year may sound egregious that "impact" is actually "one-tenth of a cent of tax on each cigar . . . ." (Dkt. 43 at p.31). This is not an extreme, or even necessarily a disproportionate, liability.

The second factor is that the imposition of retroactive liability would not be contrary to that party's reasonable expectations. As noted above, the tobacco industry was traditionally and is currently heavily regulated. The MSA was signed on November 16, 1998. The MSA was expected to reduce demand for tobacco, which it did. The market for domestically grown tobacco shrank dramatically from 1998 to 2004. *See* Nis Leerberg, 55 *DUKE L.J.* at 866 (2006). From 1997 until 2004, when FETRA was signed into law, these acknowledged problems within the tobacco industry prompted members of Congress to introduce more than twenty tobacco buyout bills. *See State of North Carolina v. Phillip Morris USA Inc.*, 618 S.E.2d 219 (N.C. Sup. Ct. 2005). It is clear from the sheer volume of legislation generated to address fallout from MSA that anyone affiliated with tobacco would be aware that sooner or later Congress was going to act to aid tobacco growers. As a past purchaser under the old system, Swisher might reasonably be expected to participate in the dismantling of that system.

In upholding the Federal Claims court's dismissal of due process and equal protection claims, the court in *Maine Yankee Atomic Power Co. v. United States*, 271 F.3d 1357, 1359- 60 (Fed. Cir. 2001), stated that although the plaintiffs may have preferred a different

system, "Congress's assignment of liability for a past problem to past consumers does not stretch the limits of the reasonable." That sentiment holds true here. FETRA does not violate the Due Process Clause and the Secretary is entitled the summary judgment on this issue.

C. Equal Protection

The Supreme Court has warned that,"[w]hether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Rather, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable* state of facts that *could* provide a rational basis for the classification." *Id.* (citations omitted) (emphasis added).

This standard of review, i.e., rational basis review, is a "paradigm of judicial restraint." *Id.* So, where there are "plausible reasons for Congress' action," the court's inquiry must be "at an end." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *see also BellSouth Corp. v. FCC*, 162 F.3d 678, 691 (D.C. Cir. 1998) (same); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (a court's inquiry is limited to asking whether "the legislation classif[ies] the persons it affects in a manner rationally related to legitimate government objectives").

In this arena, government action bears "a strong presumption of validity" and the party challenging it

"ha[s] the burden 'to negative *every conceivable basis* which might support it.'" *Beach Commc'ns*, 508 U.S. at 314-15 (citations omitted) (emphasis added). That is, so long as the reviewing court can conceive of facts which reasonably justify the classification at issue, governmental action survives rational basis review. *Id.* at 315. Such deference is afforded the government because "'the legislature must necessarily engage in a process of line-drawing.'" *BellSouth Corp.*, 162 F.3d at 692 (quoting *Fritz*, 449 U.S. at 179). "Defining the class of persons subject to a regulatory requirement - much like classifying governmental beneficiaries - 'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'" *Beach Commc'ns*, 508 U.S. at 315 (quoting Fritz, 449 U.S. at 179); *see also Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973) ("Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and ability to function.")(citation omitted).

Under FETRA there is a two-step process to determine a manufacturer's quarterly assessment. First, the overall amount needed to make transition payments to producers is allocated among the six classes of tobacco set out in FETRA, i.e., cigarettes, cigars, snuff, roll-your-own, chewing and pipe ("Step A"). 7 U.S.C. § 518(c)(1). Second, within each class, the amount required to be paid by each manufacturer is allocated on a pro rata basis based upon each manufacturer's share of

gross domestic volume as calculated under the statute ("Step B"). 7 U.S.C. § 518(e).

Swisher's Step A objection is that the maximum excise tax is used for calculating the cigar share of the portion. (Dkt. 43 at p. 33). Specifically, Swisher claims that the USDA's practice of applying maximum excise tax rates to large cigars, but actual tax rates to every other type of tobacco product, violates the equal protection principle embodied in the fifth Amendment. (Dkt. 34 at p. 28). Swisher further claims that "[b]ecause the USDA uses the maximum excise tax rate for large cigars, the cigar class necessarily receives a larger portion of the Step A burden than it would receive if a [sic] actual excise taxes were used uniformly for all tobacco products, including large cigars." (Dkt. 34 at p. 28). Swisher acknowledges that the "Government is entitled to make approximations and create proxies in allocating a financial burden among different groups;" however, Swisher concludes that the Government "cannot treat like products differently without some affirmative rationale." (Dkt. 34 at p. 29- 30).

The Secretary explained Congress's rationale in Step A by stating that:

> Plaintiff would like you to believe that the actual excise tax is the loadstone, but the fact is that what Congress did was take the fixed tax which is set in the statute for each of these items. It is true that there is only one number for everything except large cigars. That's the number that Congress took. Whatever the actual excise tax, whatever the fixed excise tax for cigarettes, that's what Congress used. When it came to large cigars, large cigars are inherently different from a taxing perspective from all those other products

because they are not subject to just one level of taxation. They have a sliding scale amount of taxation that goes up. It's approximately 20% percent of the value and it caps out at $48.75 per thousand cigars. Congress determined that it should use a fixed rate for large cigars, just like it was using a fixed rate for every other group of tobacco products. This was rational because it enables easy comparison from year to year and much easier calculations of the class A. These are administrative conveniences that are sufficient to satisfy rational basis review.

The question then becomes, was it rational to pick the particular fixed rate that they picked in this instance . . . They picked the rate that was in the statute. . . . It was also rational for the Congress to rely on the maximum excise tax rate because it did not have readily available to it actual excise tax rates at the time that it created the Step A distinctions in the statute.

(Dkt. 43, pp. 33-35).

The Secretary further claims that:

Another reason that it is rational for the Congress to have used the maximum excise tax rate, a fixed rate, is because it enables easier year-to-year comparisons regarding the sales. If the Congress had to deal with changing from year to year, both the number of cigars that were sold and what tax rates were being applied, it is much more difficult to calculate the relative market on a year-to-year basis. When you fix the excise tax rate, then the only thing that is changing is the volume of sales, which makes tracking year-to-year much easier,

> which again is an administrative convenience that is sufficient to justify a rational basis."

(Dkt. 43 at p. 35).

Swisher objects to Step B because large and small cigars are treated as part of one group. Specifically, Swisher argues that the Step B "method of allocating the intra-class share of the class's overall payment violates principles of equal protection because it is based on volume date, i.e., number of cigars sold, thereby treating all types of cigars the same regardless of how much the cigars cost." (Dkt. 35 at p. 17). Swisher informed the Court about the differences between large and small cigars - as to size, shape, weight cost and tax treatment. Little cigars are subject to an excise tax exactly like cigarettes - a flat tax. Large cigars are subject to the variable rate discussed above. Swisher informed the Court that it is the most successful manufacturer of little cigars domestically and internationally. (Dkt. 43 at p. 21). So fundamentally, Swisher is a little cigar company. At Step B, for volume purpose, Congress treats little and big cigars the same. Swisher argues that this treatment has the effect of increasing Swisher's responsibility relative to other cigar companies.

The Secretary responds that Congress rationally determined that each set of tobacco products should be treated as one group. "All of the cigarettes are grouped together, all of the snuff, and all of the cigars." (Dkt. 43 at p. 36). The Secretary acknowledges that not all cigars are the same cost, but also claims that not all cigarettes are the same price. For administrative ease, Congress "decided the easiest thing to do was to have groups that simply included the entire set of each tobacco product." (Dkt. 43 at p. 37). As the Secretary argued:

Swisher's final contention is that it is inconsistent to treat small and large cigars together at Step B when they are treated separately at Step A. The Secretary responds that: As long as both decisions had rational bases, the statute is constitutional. In this instance, it seems clear that Congress treated small and large cigars separately at Step A because Step A utilizes excise tax rates to calculate the inter-class percentages, and small and large cigars have different excise tax rates. Thus, it would have been difficult to group small and large cigars together, so it was rational to separate them. At Step B, however, excise tax rates do not come into play. Rather, at Step B allocation is based on volume, which is measured on the same basis, per stick, for both small and large cigars. It was rational therefore, to combine all cigars into one group.

It was not irrational for Congress to use excise taxes at Step A and not at Step B. At Step A, Congress was distinguishing among several different classes of products that were not similar to one another. Some products' volume was measured in pounds, others' in number of sticks sold . . .Thus, the products were not comparable, and Congress used excise tax rates to convert them into like units of measurement to enable it to make comparisons (allocations) between the classes at Step A." However, at Step B, allocation were made among companies within the same product class, whose volume is measured in the same units . . . . [Thus,] it was rational to apply the same method of class B assessment to each of the

> product categories, based on the number of taxable units, rather than try to come up with some assertedly "fairer" but more cumbersome system that would make individualized assessments of value assigned to particular sticks in the market place. Such individualization is simply not required under the rational basis test.

(Dkt. 35 at p.19).

Having laid out the parties' arguments, the Court understands Swisher's frustration with FETRA. The Court further appreciates that had the implementing regulations been formulated in the manner Swisher desires, they might be more fair to Swisher. However, in the context of equal protection, sympathy and potentially better methodology cannot factor into our analysis. During oral argument, Swisher's counsel noted on the record that his client's equal protection claims are strong and compelling. (Dkt. 43 at p. 22). However, he also noted that such claims are rarely upheld.

Under the principles espoused above, FETRA's implementing regulations are constitutional. Swisher has failed to meet its burden of negating the Secretary's proffered rationales. The ultimate wisdom of the implementing regulations might be questioned, but that is not sufficient to render the regulations unconstitutional or to create an issue of material fact for purposes of surviving summary judgment. As the court stated in *Brown-Forman Co. v. Commonwealth of Kentucky*, 217 U.S. 563, 573 (1910), "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection under the law.'" Administrative efficiency has been found to provide a rational basis. *See Partlo v. Johanns*, 2006 WL 1663380

at *17 (D.D.C June 11, 2006) (internal citations omitted).[19]

The FETRA implementing regulations are rationally related to a legitimate government purpose and do not violate the Equal Protection Clause of the Constitution, thus the Secretary is entitled to summary judgment on this issue.

[19] The court's analysis in *Partlo* is very instructive on the issues presented by this case.

VI. Conclusion

Underlying Swisher's arguments is the notion that the funds Swisher is required to pay under FETRA are more akin to an exaction than an assessment. An exaction is defined as a "fee, reward, or contribution demanded or levied with severity or injustice." *Merriam-Webster's On-Line Dictionary*, available at http://www.m-w.com/dictionary/exaction. The Court sympathizes with Swisher. However unpalatable, seemingly unjust and onerous FETRA is to Swisher, and regardless of the fact that it may have been crafted by lobbyists to relieve cigarette manufacturers of their financial burdens under the MSA, it is not unconstitutional.

In accordance with the Court's findings above, summary judgment is appropriate for the Secretary on all counts in the Complaint. The Secretary's Motion for Summary Judgment (Dkt. 24) is **GRANTED** and Swisher's Cross Motion for Summary Judgment (Dkt. 34) is **DENIED**. The Clerk is **DIRECTED** to enter judgment for the Secretary and to **CLOSE** this case.

DONE and ORDERED in Chambers in Jacksonville, Florida on this 27th day of November 2007.

APPENDIX C

FAIR AND EQUITABLE TOBACCO REFORM ACT OF 2004

§ 518. Definitions

In this subchapter and subchapter II of this chapter:

(1) Agricultural Act of 1949

The term "Agricultural Act of 1949" means the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), as in effect on the day before October 22, 2004.

(2) Agricultural Adjustment Act of 1938

The term "Agricultural Adjustment Act of 1938" means the Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 et seq.), as in effect on the day before October 22, 2004.

(3) Considered planted

The term "considered planted" means tobacco that was planted, but failed to be produced as a result of a natural disaster, as determined by the Secretary.

(4) Contract

The term "contract" means a contract entered into under section 518a or 518b of this title.

(5) Contract payment

The term "contract payment" means a payment made under section 518a or 518b of this title pursuant to a contract.

(6) Producer of quota tobacco

The term "producer of quota tobacco" means an owner, operator, landlord, tenant, or sharecropper that shared in the risk of producing tobacco on a farm where tobacco was produced or considered planted pursuant to a tobacco farm poundage quota or farm acreage allotment established under part I of subtitle B of title III of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1311 et seq.).

(7) Quota tobacco

The term 'quota tobacco' [FN1] means a kind of tobacco that is subject to a farm marketing quota or farm acreage allotment for the 2004 tobacco marketing year under a marketing quota or allotment program established under part I of subtitle B of title III of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1311 et seq.).

(8) Tobacco

The term "tobacco" means each of the following kinds of tobacco:

(A) Flue-cured tobacco, comprising types 11, 12, 13, and 14.

(B) Fire-cured tobacco, comprising types 22 and 23.

(C) Dark air-cured tobacco, comprising types 35 and 36.

(D) Virginia sun-cured tobacco, comprising type 37.

(E) Virginia fire-cured tobacco, comprising type 21.

(F) Burley tobacco, comprising type 31.

(G) Cigar-filler and cigar-binder tobacco, comprising types 42, 43, 44, 53, 54, and 55.

(9) Tobacco quota holder

The term "tobacco quota holder" means a person that was an owner of a farm, as of October 22, 2004, for which a basic tobacco farm marketing quota or farm acreage allotment for quota tobacco was established for the 2004 tobacco marketing year.

(10) Tobacco Trust Fund

The term "Tobacco Trust Fund" means the Tobacco Trust Fund established under section 518e of this title.

(11) Secretary

The term "Secretary" means the Secretary of Agriculture.

§ 518a. Contract payments to tobacco quota holders

(a) Contract offered

The Secretary shall offer to enter into a contract with each tobacco quota holder under which the tobacco quota holder shall be entitled to receive payments under this section in exchange for the termination of tobacco marketing quotas and related price support under the amendments made by sections 611 and 612. The contract

payments shall constitute full and fair consideration for the termination of such tobacco marketing quotas and related price support.

(b) Eligibility

To be eligible to enter into a contract to receive a contract payment under this section, a person shall submit to the Secretary an application containing such information as the Secretary may require to demonstrate to the satisfaction of the Secretary that the person is a tobacco quota holder. The application shall be submitted within such time, in such form, and in such manner as the Secretary may require.

(c) Base quota level

(1) Establishment

The Secretary shall establish a base quota level applicable to each tobacco quota holder identified under subsection (b) of this section.

(2) Poundage quotas

Subject to adjustment under subsection (d) of this section, for each kind of tobacco for which the marketing quota is expressed in pounds, the base quota level for each tobacco quota holder shall be equal to the basic quota for quota tobacco established for the 2002 tobacco marketing year under a marketing quota program established under part I of subtitle B of title III of the Agriculture [FN1] Adjustment Act of 1938 [7 U.S.C.A. § 1311 et seq.] on the farm owned by the tobacco quota holder.

(3) Marketing quotas other than poundage quota.s

Subject to adjustment under subsection (d) of this section, for each kind of tobacco for which there is marketing quota or allotment on an acreage basis, the base quota level for each tobacco quota holder shall be the quantity equal to the product obtained by multiplying--

(A) the basic tobacco farm marketing quota or allotment for the 2002 marketing year established by the Secretary for quota tobacco owned by the tobacco quota holder; by

(B) the average production yield, per acre, for the period covering the 2001, 2002, and 2003 crop years for that kind of tobacco in the county in which the quota tobacco is located.

(d) Treatment of certain contracts and agreements

(1) Effect of purchase contract

If there was an agreement for the purchase of all or part of a farm described in subsection (c) of this section as of October 22, 2004, and the parties to the sale are unable to agree to the disposition of eligibility for contract payments, the Secretary, taking into account any transfer of quota that has been agreed to, shall provide for the equitable division of the contract payments among the parties by adjusting the determination of who is the tobacco quota holder with respect to particular pounds or allotment of the quota.

(2) Effect of agreement for permanent quota transfer

If the Secretary determines that there was in existence, as of the day before October 22, 2004, an agreement for the permanent transfer of quota, but that the transfer was not

completed by that date, the Secretary shall consider the tobacco quota holder to be the party to the agreement that, as of that date, was the owner of the farm to which the quota was to be transferred.

(e) Contract payments

(1) Calculation of total payment amount

The total amount of contract payments to which an eligible tobacco quota holder is entitled under this section, with respect to a kind of tobacco, shall be equal to the product obtained by multiplying--

(A) $7.00 per pound; by

(B) the base quota level of the tobacco quota holder determined under subsection (c) of this section with respect to that kind of tobacco.

(2) Annual payment

During each of fiscal years 2005 through 2014, the Secretary shall make a contract payment under this section to each eligible tobacco quota holder, with respect to a kind of tobacco, in an amount equal to 1/10 of the amount determined under paragraph (1) for the tobacco quota holder for that kind of tobacco.

(f) Death of tobacco quota holder

If a tobacco quota holder who is entitled to contract payments under this section dies and is survived by a spouse or one or more dependents, the right to receive the payments shall transfer to the surviving spouse or, if there is no surviving spouse, to the estate of the tobacco quota holder.

§ 518b. Contract payments for producers of quota tobacco

(a) Contract offered

The Secretary shall offer to enter into a contract with each producer of quota tobacco under which the producer of quota tobacco shall be entitled to receive payments under this section in exchange for the termination of tobacco marketing quotas and related price support under the amendments made by sections 611 and 612. The contract payments shall constitute full and fair consideration for the termination of such tobacco marketing quotas and related price support.

(b) Eligibility

(1) Application and determination

To be eligible to enter into a contract to receive a contract payment under this section, a person shall submit to the Secretary an application containing such information as the Secretary may require to demonstrate to the satisfaction of the Secretary that the person is a producer of quota tobacco. The application shall be submitted within such time, in such form, and in such manner as the Secretary may require.

(2) Effect of multiple producers for same quota tobacco

If, on the basis of the applications submitted under paragraph (1) or other information, the Secretary determines that two or more persons are a producer of the same quota tobacco, the Secretary shall provide for an equitable distribution among the persons of the contract payments made under this section with respect to that quota tobacco, based on relative share of such persons in

the risk of producing the quota tobacco and such other factors as the Secretary considers appropriate.

(c) Base quota level

(1) Establishment

The Secretary shall establish a base quota level applicable to each producer of quota tobacco, as determined under this subsection.

(2) Flue-cured and burley tobacco

In the case of Flue-cured tobacco (types 11, 12, 13, and 14) and Burley tobacco (type 31), the base quota level for each producer of quota tobacco shall be equal to the effective tobacco marketing quota (irrespective of disaster lease and transfers) under part I of subtitle B of title III of the Agriculture [FN1] Adjustment Act of 1938 [7 U.S.C.A. § 1311 et seq.] for the 2002 marketing year for quota tobacco produced on the farm.

(3) Other kinds of tobacco

In the case of each kind of tobacco (other than tobacco covered by paragraph (2)), for the purpose of calculating a contract payment to a producer of quota tobacco, the base quota level for the producer of quota tobacco shall be the quantity obtained by multiplying--

(A) the basic tobacco farm acreage allotment for the 2002 marketing year established by the Secretary for quota tobacco produced on the farm; by

(B) the average annual yield, per acre, of quota tobacco produced on the farm for the period covering the 2001, 2002, and 2003 crop years.

(d) Contract payments

(1) Calculation of total payment amount

Subject to subsection (b)(2) of this section, the total amount of contract payments to which an eligible producer of quota tobacco is entitled under this section, with respect to a kind of tobacco, shall be equal to the product obtained by multiplying--

(A) subject to paragraph (2), $3.00 per pound; by

(B) the base quota level of the producer of quota tobacco determined under subsection (c) of this section with respect to that kind of tobacco.

(2) Annual payment

During each of fiscal years 2005 through 2014, the Secretary shall make a contract payment under this section to each eligible producer of tobacco, with respect to a kind of tobacco, in an amount equal to 1/10 of the amount determined under paragraph (1) for the producer for that kind of tobacco.

(3) Variable payment rates

The rate for payments to a producer of quota tobacco under paragraph (1)(A) shall be equal to--

(A) in the case of a producer of quota tobacco that produced quota tobacco marketed, or considered planted, under a marketing quota in all three of the 2002, 2003, or 2004 tobacco marketing years, the rate prescribed under paragraph (1)(A);

(B) in the case of a producer of quota tobacco that produced quota tobacco marketed, or considered planted, under a marketing quota in only two of those tobacco marketing years, 2/3 of the rate prescribed under paragraph (1)(A);

(C) in the case of a producer of quota tobacco that produced quota tobacco marketed, or considered planted, under a marketing quota in only one of those tobacco marketing years, 1/3 of the rate prescribed under paragraph (1)(A).

(e) Death of tobacco producer

If a producer of quota tobacco who is entitled to contract payments under this section dies and is survived by a spouse or one or more dependents, the right to receive the contract payments shall transfer to the surviving spouse or, if there is no surviving spouse, to the estate of the producer.

§ 518c. Administration

(a) Time for payment of contract payments

Contract payments required to be made for a fiscal year shall be made by the Secretary as soon as practicable.

(b) Use of county committees to resolve disputes

Any dispute regarding the eligibility of a person to enter into a contract or to receive contract payments, and any dispute regarding the amount of a contract payment, may be appealed to the county committee established under section 590h of Title 16 for the county or other area in which the farming operation of the person is located.

(c) Role of National Appeals Division

Any adverse determination of a county committee under subsection (b) of this section may be appealed to the National Appeals Division established under subtitle H of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6991 et seq.).

(d) Use of financial institutions

The Secretary may use a financial institution to manage assets, make contract payments, and otherwise carry out this title.

(e) Payment to financial institutions

The Secretary shall permit a tobacco quota holder or producer of quota tobacco entitled to contract payments to assign to a financial institution the right to receive the contract payments. Upon receiving notification of the assignment, the Secretary shall make subsequent contract payments for the tobacco quota holder or producer of quota tobacco directly to the financial institution designated by the tobacco quota holder or producer of quota tobacco. The Secretary shall make information available to tobacco quota holders and producers of quota tobacco regarding their ability to elect to have the Secretary make payments directly to a financial institution under this subsection so that they may obtain a lump sum or other payment.

§ 518d. Use of assessments as source of funds for payments

(a) Definitions

In this section:

(1) Base period

The term "base period' [FN1] means the one-year period ending the June 30 before the beginning of a fiscal year.

(2) Gross domestic volume

The term "gross domestic volume" means the volume of tobacco products--

(A) removed (as defined by section 5702 of Title 26); and

(B) not exempt from tax under chapter 52 of Title 26 at the time of their removal under that chapter or the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202).

(3) Market share

The term "market share" means the share of each manufacturer or importer of a class of tobacco product (expressed as a decimal to the fourth place) of the total volume of domestic sales of the class of tobacco product during the base period for a fiscal year for an assessment under this section.

(b) Quarterly assessments

(1) Imposition of assessment

The Secretary, acting through the Commodity Credit Corporation, shall impose quarterly assessments during each of fiscal years 2005 through 2014, calculated in accordance with this section, on each tobacco product manufacturer and tobacco product importer that sells tobacco products in domestic commerce in the United States during that fiscal year.

(2) Amounts

Beginning with the calendar quarter ending on December 31 of each of fiscal years 2005 through 2014, the assessment payments over each four-calendar quarter period shall be sufficient to cover--

(A) the contract payments made under sections 518a and 518b of this title during that period; and

(B) other expenditures from the Tobacco Trust Fund made during the base quarter periods corresponding to the four calendar quarters of that period.

(3) Deposit

Assessments collected under this section shall be deposited in the Tobacco Trust Fund.

(c) Assessments for classes of tobacco products

(1) Initial allocation

The percentage of the total amount required by subsection (b) of this section to be assessed against, and paid by, the

manufacturers and importers of each class of tobacco product in fiscal year 2005 shall be as follows:

(A) For cigarette manufacturers and importers, 96.331 percent.

(B) For cigar manufacturers and importers, 2.783 percent.

(C) For snuff manufacturers and importers, 0.539 percent.

(D) For roll-your-own tobacco manufacturers and importers, 0.171 percent.

(E) For chewing tobacco manufacturers and importers, 0.111 percent.

(F) For pipe tobacco manufacturers and importers, 0.066 percent.

(2) Subsequent allocations

For subsequent fiscal years, the Secretary shall periodically adjust the percentage of the total amount required under subsection (b) of this section to be assessed against, and paid by, the manufacturers and importers of each class of tobacco product specified in paragraph (1) to reflect changes in the share of gross domestic volume held by that class of tobacco product.

(3) Effect of insufficient amounts

If the Secretary determines that the assessment imposed under subsection (b) of this section will result in insufficient amounts to carry out this subchapter during a fiscal year, the Secretary shall assess such additional amounts as the Secretary determines to be necessary to carry out this subchapter during that fiscal year. The

additional amount shall be allocated to manufacturers and importers of each class of tobacco product specified in paragraph (1) in the same manner and based on the same percentages applicable under paragraph (1) or (2) for that fiscal year.

(d) Notification and timing of assessments

(1) Notification of assessments

The Secretary shall provide each manufacturer or importer subject to an assessment under subsection (b) of this section with written notice setting forth the amount to be assessed against the manufacturer or importer for each quarterly payment period. The notice for a quarterly period shall be provided not later than 30 days before the date payment is due under paragraph (3).

(2) Content

The notice shall include the following information with respect to the quarterly period used by the Secretary in calculating the amount:

(A) The total combined assessment for all manufacturers and importers of tobacco products.

(B) The total assessment with respect to the class of tobacco products manufactured or imported by the manufacturer or importer.

(C) Any adjustments to the percentage allocations among the classes of tobacco products made pursuant to paragraph (2) or (3) of subsection (c) of this section.

(D) The volume of gross sales of the applicable class of tobacco product treated as made by the manufacturer or

importer for purposes of calculating the manufacturer's or importer's market share under subsection (f) of this section.

(E) The total volume of gross sales of the applicable class of tobacco product that the Secretary treated as made by all manufacturers and importers for purposes of calculating the manufacturer's or importer's market share under subsection (f) of this section.

(F) The manufacturer's or importer's market share of the applicable class of tobacco product, as determined by the Secretary under subsection (f) of this section.

(G) The market share, as determined by the Secretary under subsection (f) of this section, of each other manufacturer and importer, for each applicable class of tobacco product.

(3) Timing of assessment payments

(A) Collection date

Assessments shall be collected at the end of each calendar year quarter, except that the Secretary shall ensure that the final assessment due under this section is collected not later than September 30, 2014.

(B) Base period quarter

The assessment for a calendar year quarter shall correspond to the base period quarter that ended at the end of the preceding calendar year quarter.

(e) Allocation of assessment within each class of tobacco product

(1) Pro rata basis

The assessment for each class of tobacco product specified in subsection (c)(1) of this section shall be allocated on a pro rata basis among manufacturers and importers based on each manufacturer's or importer's share of gross domestic volume.

(2) Limitation

No manufacturer or importer shall be required to pay an assessment that is based on a share that is in excess of the manufacturer's or importer's share of domestic volume.

(f) Allocation of total assessments by market share

The amount of the assessment for each class of tobacco product specified in subsection (c)(1) of this section to be paid by each manufacturer or importer of that class of tobacco product shall be determined for each quarterly payment period by multiplying--

(1) the market share of the manufacturer or importer, as calculated with respect to that payment period, of the class of tobacco product; by

(2) the total amount of the assessment for that quarterly payment period under subsection (c) of this section, for the class of tobacco product.

(g) Determination of volume of domestic sales

(1) In general

The calculation of the volume of domestic sales of a class of tobacco product by a manufacturer or importer, and by all manufacturers and importers as a group, shall be made

by the Secretary based on information provided by the manufacturers and importers pursuant to subsection (h) of this section, as well as any other relevant information provided to or obtained by the Secretary.

(2) Gross domestic volume

The volume of domestic sales shall be calculated based on gross domestic volume.

(3) Measurement

For purposes of the calculations under this subsection and the certifications under subsection (h) of this section by the Secretary, the volumes of domestic sales shall be measured by--

(A) in the case of cigarettes and cigars, the number of cigarettes and cigars; and

(B) in the case of the other classes of tobacco products specified in subsection (c)(1) of this section, in terms of number of pounds, or fraction thereof, of those products.

(h) Measurement of volume of domestic sales

(1) Submission of information

Each manufacturer and importer of tobacco products shall submit to the Secretary a certified copy of each of the returns or forms described by paragraph (2) that are required to be filed with a Federal agency on the same date that those returns or forms are filed, or required to be filed, with the agency.

(2) Returns and forms

The returns and forms described by this paragraph are those returns and forms that relate to--

(A) the removal of tobacco products into domestic commerce (as defined by section 5702 of Title 26); and

(B) the payment of the taxes imposed under charter [FN2] 52 of Title 26, including AFT Form 5000.24 and United States Customs Form 7501 under currently applicable regulations.

(3) Effect of failure to provide required information

Any person that knowingly fails to provide information required under this subsection or that provides false information under this subsection shall be subject to the penalties described in section 1003 of Title 18. The Secretary may also assess against the person a civil penalty in an amount not to exceed two percent of the value of the kind of tobacco products manufactured or imported by the person during the fiscal year in which the violation occurred, as determined by the Secretary.

(i) Challenge to assessment

(1) Appeal to Secretary

A manufacturer or importer subject to this section may contest an assessment imposed on the manufacturer or importer under this section by notifying the Secretary, not later than 30 business days after receiving the assessment notification required by subsection (d) of this section, that the manufacturer or importer intends to contest the assessment.

(2) Information

Not later than 180 days after October 22, 2004, the Secretary shall establish by regulation a procedure under which a manufacturer or importer contesting an assessment under this subsection may present information to the Secretary to demonstrate that the assessment applicable to the manufacturer or importer is incorrect. In challenging the assessment, the manufacturer or importer may use any information that is available, including third party data on industry or individual company sales volumes.

(3) Revision

If a manufacturer or importer establishes that the initial determination of the amount of an assessment is incorrect, the Secretary shall revise the amount of the assessment so that the manufacturer or importer is required to pay only the amount correctly determined.

(4) Time for review

Not later than 30 days after receiving notice from a manufacturer or importer under paragraph (1), the Secretary shall--

(A) decide whether the information provided to the Secretary under paragraph (2), and any other information that the Secretary determines is appropriate, is sufficient to establish that the original assessment was incorrect; and

(B) make any revisions necessary to ensure that each manufacturer and importer pays only its correct pro rata share of total gross domestic volume from all sources.

(5) Immediate payment of undisputed amounts

The regulations promulgated by the Secretary under paragraph (2) shall provide for the immediate payment by a manufacturer or importer challenging an assessment of that portion of the assessment that is not in dispute. The manufacturer and importer may place into escrow, in accordance with such regulations, only the portion of the assessment being challenged in good faith pending final determination of the claim.

(j) Judicial review

(1) In general

Any manufacturer or importer aggrieved by a determination of the Secretary with respect to the amount of any assessment may seek review of the determination in the United States District Court for the District of Columbia or for the district in which the manufacturer or importer resides or has its principal place of business at any time following exhaustion of the administrative remedies available under subsection (i) of this section.

(2) Time limits

Administrative remedies shall be deemed exhausted if no decision by the Secretary is made within the time limits established under subsection (i)(4) of this section.

(3) Excessive assessments

The court shall restrain collection of the excessive portion of any assessment or order a refund of excessive assessments already paid, along with interest calculated at the rate prescribed in section 3717 of Title 31, if it finds that the Secretary's determination is not supported by a

preponderance of the information available to the Secretary.

(k) Termination date

The authority provided by this section to impose assessments terminates on September 30, 2014.

§ 518e. Tobacco Trust Fund

(a) Establishment

There is established in the Commodity Credit Corporation a revolving trust fund, to be known as the "Tobacco Trust Fund", which shall be used in carrying out this subchapter. The Tobacco Trust Fund shall consist of the following:

(1) Assessments collected under section 518d of this title.

(2) Such amounts as are necessary from the Commodity Credit Corporation.

(3) Any interest earned on investment of amounts in the Tobacco Trust Fund under subsection (c) of this section.

(b) Expenditures

(1) Authorized expenditures

Subject to paragraph (2), and notwithstanding any other provision of law, the Secretary shall use amounts in the Tobacco Trust Fund, in such amounts as the Secretary determines are necessary--

(A) to make payments under sections 518a and 518b of this title;

(B) to provide reimbursement under section 519(c) of this title;

(C) to reimburse the Commodity Credit Corporation for costs incurred by the Commodity Credit Corporation under paragraph (2); and

(D) to make payments to financial institutions to satisfy contractual obligations under section 518a or 518b of this title.

(2) Expenditures by commodity credit corporation

Notwithstanding any other provision of law, the Secretary shall use the funds, facilities, and authorities of the Commodity Credit Corporation to make payments described in paragraph (1). Not later than January 1, 2015, the Secretary shall use amounts in the Tobacco Trust Fund to fully reimburse, with interest, the Commodity Credit Corporation for all funds of the Commodity Credit Corporation expended under the authority of this paragraph. Administrative costs incurred by the Secretary or the Commodity Credit Corporation to carry out this title may not be paid using amounts in the Tobacco Trust Fund.

(c) Investment of amounts

(1) In general

The Commodity Credit Corporation shall invest such portion of the amounts in the Tobacco Trust Fund as are not, in the judgment of the Commodity Credit Corporation, required to meet current expenditures.

(2) Interest-bearing obligations

Investments may be made only in interest-bearing obligations of the United States.

(3) Acquisition of obligations

For the purpose of investments under paragraph (1), obligations may be acquired--

(A) on original issue at the issue price; or

(B) by purchase of outstanding obligations at the market price.

(4) Sale of obligations

Any obligation acquired by the Tobacco Trust Fund may be sold by the Commodity Credit Corporation at the market price.

(5) Credits to fund

The interest on, and the proceeds from the sale or redemption of, any obligations held in the Tobacco Trust Fund shall be credited to and form a part of the Fund.

§ 518f. Limitation on total expenditures

The total amount expended by the Secretary from the Tobacco Trust Fund to make payments under sections 518a and 518b of this title and for the other authorized purposes of the Fund shall not exceed $10,140,000,000.

APPENDIX D

UNITED STATES DEPARTMENT DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA JACKSONVILLE
DIVISION

SWISHER INTERNATIONAL, INC.,

Plantiff, No. 305-CV-J-16-TEM

v. **STIPULATED FACTS**

MIKE JOHANNS,
Secretary of Agriculture,

Defendant.

1. Swisher International Inc. ("Swisher") is a corporation, duly incorporated under the laws of Delaware, with its principal operations located in Jacksonville, Florida.

2. Swisher is primarily a manufacturer of small and large cigars, and it also produces some smokeless tobacco products.

3. Mike Johanns is the United States Secretary of Agriculture.

4. The Commodity Credit Corporation ("CCC") is an agency and instrumentality of the United States within the Department of Agriculture ("USDA").

5. The initial allocation of assessments among the classes of tobacco products that is set forth for fiscal year 2005 in the 2004 Act used the maximum applicable excise rate for each class, not the actual excise tax rate paid by a manufacturer, applicable to a class of tobacco products.

6. All tobacco products referenced in the 2004 Act, other than large cigars, have a non-variable excise tax rate.

7. Because the excise tax rate for large cigars is variable, the "maximum" rate may not reflect the actual rate paid by manufacturers and importers of large cigars.

8. For fiscal year 2006, CCC has allocated assessments among product classes by multiplying net tobacco products removed (sold) by the maximum excise tax rate for each type of tobacco.

9. For fiscal year 2006, CCC has calculated that the cigar class share of overall assessments is 3.0442%.

10. For fiscal year 2007, CCC estimates, based on available maximum excise tax data, that the cigar class share of overall assessments will be 3.2846%.

11. Because the "maximum" rate will not reflect the actual rate paid by at least some manufacturers and importers of large cigars, the aggregate actual excise taxes paid by all cigar manufacturers and importers during a given period is less than the aggregate maximum excise taxes applicable to such cigar manufacturers' and importers' products sold during the same period.

12. USDA estimates, based on available data, that if the inter-class allocation for fiscal year 2007 were performed based on actual excise taxes, rather than maximum excise taxes, then the cigar class allocation would be approximately 27% smaller approximately 2.3891% rather than 3.2846%.

13. In 1999, a total of 1,248,900,000 pounds of quota tobacco were sold through the quota program. During that year, according to data produced by Swisher, Swisher

purchased 238,212 pounds of quota tobacco -- or .019% of the total - for use in its Cigars.

14. In 2000, a total of 948,300,000 pounds of quota tobacco were sold through the quota program. During that year, according to data produced by Swisher, Swisher purchased 280,634 pounds of quota tobacco - or .029% of the total- for use in its Cigars.

15. In 2001, a total of 944,800,000 pounds of quota tobacco were sold through the quota program. During that year, according to data produced by Swisher, Swisher purchased 262,106 pounds of quota tobacco - or .028% of the total- for use in its cigars.

16. In 2002, a total of 914,700,000 pounds of quota tobacco were sold through the quota program. During that year, according to data produced by Swisher, Swisher purchased 283,448 pounds of quota tobacco - or .031% of the total- for use in its cigars.

17. In 2003, a total of 829,500,000 pounds of quota tobacco were sold through the quota program. During that year, according to data produced by Swisher, Swisher purchased 348,620 pounds of quota tobacco - or .042% of the total- for use in its cigars.

18. In 2004, a total of 831 ,900,000 pounds of quota tobacco were sold through the quota program. During that year, according to data produced by Swisher, Swisher purchased 280,920 pounds of quota tobacco - or .034% of the total- for use in its cigars.

19. Several of the cigar-type tobaccos that Swisher purchased in 2001, 2002, and 2003 were disapproved and discontinued, and therefore not subject to the quota system.

20. Swisher has never been asked by USDA to submit a statement of its purchasing intentions.

21. Generally, small cigars are less expensive per unit than large cigars.

Dated: May 16, 2006
Tampa, Florida

/s/ Edward O. Savitz
Edward O. Savitz
Fla. Bar No. 0183867
Glenn M. Katon
Fla. Bar No. 0636894
BUSH ROSS, P.A.
Post Office Box 3913
Tampa, Florida 33601-3913
(813) 224-9255 - Telephone
(813) 223-9620 - Facsimile

Andrew G. Celli, Jr.
Eric Hecker
EMERY CELLI BRINCKERHOFF
& ABADYLLP
545 Madison Avenue
New York, New York 10022
(212) 763-5000 - Telephone
ATTORNEYS FOR PLAINTIFF